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Work of the Missouri Supreme Court for the Year 1938

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THE WORK OF THE MISSOURI SUPREME COURT FOR THE YEAR 1938

With this issue the *Missouri Law Review* presents its third annual survey of the work of the Missouri Supreme Court. Emphasis has again been placed upon decisions announcing doctrines new to Missouri law, applying established principles of law beyond previously defined limits, or presenting fact situations of unusual interest, in the more active fields of litigation. It is hoped that these surveys may, in their cumulative effect, present the part of the judicial process in the steady growth of the law.

In September, 1938, Judge Lucas was appointed to the vacancy left by the death of Judge Frank. In other respects the personnel of the court was unchanged from the end of the preceding year.

COURT ORGANIZATION

LAURANCE M. HYDE*

The Committee on Improvement of Appellate Practice, of the Section on Judicial Administration, after two years of study, reported to the San Francisco meeting of the American Bar Association upon the matter of methods of enlarging the capacity of courts of review. The committee considered the respective merits of a system of intermediate appellate courts, with successive appeals from one court to another, in contrast with the divisional system of organization in a single appellate court. The report stated: "The extensive canvass which the committee has made among

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the judges of these courts of last resort which sit in divisions, has disclosed no instance of dissatisfaction with the practical operation of the system. We believe that a simple, speedy and inexpensive method of dealing with appeals is a matter of vital importance for restoring public confidence in the capacity of the courts to render satisfactory service at reasonable cost and without undue delay. We therefore recommend, as the most satisfactory method of dealing with appeals from courts of general jurisdiction, that a single appellate court should ordinarily be employed, with final jurisdiction in all cases, to be organized into as many divisions as may be necessary to deal with the cases brought before it." It was also suggested that this recommendation might be "subject to the limitation, if any, which experience may justify regarding the number of divisions which can effectively work together;" but that "whether or to what extent this would be true can be determined only by future experience, since no American or English courts have operated with more than three divisions." There was a dissent from this recommendation by the California member and the California Bar Association has since approved a report unfavorable to its adoption in California. States of considerable population living in great areas like Texas and California prefer the intermediate appellate court system, with each intermediate court having a limited territorial jurisdiction, and with a final reviewing court over them all.

Few states have had as long experience with the divisional system as Missouri. The Missouri Supreme Court, with seven judges, has operated in two divisions since 1891. Three judges (sitting as Division 2) hear all appeals in criminal cases. For many years they have been able to keep the criminal docket on a current basis (all cases heard at the return term of the appeal), and to also have time to hear many of the appeals on the civil docket. The other four judges (sitting as Division 1) hear appeals in civil cases only. Cases in which there is a dissent, in either division, may be transferred to the court *en banc* and heard by all seven judges. Cases may be also transferred on the court's own motion and cases involving matters of great public importance are frequently heard *en banc* without being first heard in a division.[1]

The divisional system has unquestionably enabled the court to hear and determine almost double the number of cases that it could have disposed of if all cases had to be heard by the court *en banc*. Even with the aid

1. Mo. CONST. art. VI, amend. of 1890.

of divisional organization, it has not been possible for the supreme court to keep up with the rapid increase of cases on its civil docket during the past 50 years. In 1920, a constitutional amendment was proposed to add two more judges so that the supreme court could sit in three divisions of three judges each. The amendment did not receive a majority vote and the proposition has never been resubmitted. Additional judges have been provided by the statutory method of creating and continuing a commission of six members, three of whom sit with and write opinions in each division; opinions written by the commissioners becoming the court's opinion when adopted by a majority vote of the judges of the division in which the cases were heard. By this method, the court has been able to gain materially toward bringing its civil docket to a current basis.

Missouri's three courts of appeals, which are composed of three judges each, having limited territorial jurisdiction, are not true intermediate appellate courts because their decisions are final in the cases they are authorized to hear. (Cases involving $7500.00 or less unless constitutional or certain other questions are involved.)[2] Since there is no appeal to the supreme court from their decisions, they serve to a considerable extent, in effect, as additional divisions of the supreme court. Like such divisions, they may transfer cases to the supreme court for further consideration, which is usually done where there is a dissent, or where there is conflict between the courts of appeals. (Whether these are heard there in division or *en banc* is determined by the supreme court.) There is, of course, also a limited review by *certiorari* in the supreme court, for conflict with its decisions only, for the purpose of preventing inconsistent appellate rulings of law. However, in the great majority of the courts of appeals cases, there is no attempt made to obtain further review and these courts thus relieve the supreme court of a vast amount of work.

The work done by the Missouri Supreme Court in the last decade (1927-1937) for which statistics have been published in the State Official Manual (Blue Book) is shown by Table I on the following page.

This table shows that during this ten year period (1927-37) the court has disposed of 4085 cases by written opinions. Of these, 892 opinions were written in criminal cases in Division 2. The remaining 3193 opinions were in civil cases; the majority written in Division 1, but many in Division 2

2. MO. CONST. art. VI, § 12; art. V, amend. of 1884.

and a considerable number *en banc*. In addition, 1411 applications for writs (all of which required research on the part of at least one member of the court) were disposed of in conferences of the court *en banc*; 3491 cases were dismissed for failure to perfect appeal or otherwise disposed of with-

TABLE I.

Year	Criminal cases decided by written opinion	Civil cases decided by written opinion	Total cases decided by written opinion	Applications for writs disposed of without opinion	Appeals dismissed or otherwise disposed of without opinion	Total cases disposed of
1927	164	313	477	141	274	892
1928	113	377	490	135	370	995
1929	95	393	488	123	421	1032
1930	92	289	381	133	329	843
1931	76	322	398	130	269	797
1932	89	359	448	163	285	896
1933	75	316	391	133	383	907
1934	40	272	321	174	527	1013
1935	75	256	331	147	337	815
1936	73	296	369	132	296	797
Ten year Totals	892	3193	4085	1411	3491	8987

Total civil and criminal cases decided by written opinions	4085
Total applications for writs decided	1411
Total appeals dismissed or otherwise disposed of without opinion	3491
Total cases disposed of finally	8987

out opinion in the two divisions and *en banc*, and it is safe to say that at least 500 of these also required some research and conference discussion, either in division or *en banc*. Thus the court, during this ten year period, disposed of almost 9000 cases, of which more than 4000 required written opinions and at least 2000 more required research and conference discussion. In short, 9000 cases were finally disposed of and of these, at least two-thirds, or 6000 cases, required either written opinions or research on the part of some member of the court and time in conference for discussion (either in division or *en banc*) prior to their final disposition.

It is obvious that this amount of judicial work could not have been done if all cases had to be heard *en banc*. Nor does the determination of these cases constitute all the work of the court. During the above period, the judges have been called upon to do a constantly increasing amount of administrative work in connection with regulation of the practice of law. For many years, the matter of admission to the bar has been under the complete supervision of the court. More recently, certain unwholesome conditions have made it necessary for the court to take charge of the ethics and discipline by formulation of rules and organization of enforcement committees. This work has certainly brought about beneficial results which have materially increased public respect for bench and bar. The court has also concerned itself with the matter of unlawful practice and, through its judicial council, with improvement of procedure. A resolution of the last (1939) legislature has called upon the court to consider and make recommendations to its 1941 session for the modernization of procedure in accordance with the precedent established by the Congress and Supreme Court of the United States in revising federal procedure. Except for the efficiency of the divisional system in disposing of judicial business, and the relief of divisional dockets by the many cases decided by commissioners' opinions, the judges certainly could not undertake these essential additional activities. Perhaps they may require further consideration of the 1920 proposal to add a third division by providing for two more judges so that the court could be organized into three divisions, each with three judges and two commissioners.

In opposition to the divisional system the argument is made that inconsistent opinions from different divisions of the court would unsettle the law, and fear is expressed that sessions *en banc* would not be able to harmonize them. Certainly, almost a half century's experience with the divisional system in Missouri tends to show that inconsistent opinions from different divisions have never been a serious problem. Such a complaint

is seldom heard in arguments before the court. Of course, there will never be complete harmony of decisions, even in a one division court, because judges will disagree. Perhaps, a practical reason for the success of the divisional system in the Missouri Supreme Court is that all the judges and commissoners live in the capital city, have their offices, hold their sessions, and do their work in the same building. (It may be noted that this is true of the Supreme Court of England where even the trial courts, as well as the appellate courts, are housed in the Law Courts Building in London.) Working together in the same building makes for much more collaboration between members of different divisions and tends to bring about harmony of decision by the practical method of individual consultation while opinions are being written. In this way, if there is a difference of views between divisions or members of a division, it is more likely to be known immediately and the case can go at once to the court *en banc* for the matter to be settled. It seems apparent that the divisional system will work much better where close association in the work of the court is made possible by having the judges of all divisions located in the same building, holding all court sessions at the same place, and doing all the work of the court there. It also seems reasonable to believe that there is a limitation on the number of men and the number of divisions that can thus work well together. Our system of courts of appeals, which are courts of last resort in a large class of cases, is an extension of the divisional system and a reasonable compromise between the system of the one appellate court (which might become unwieldy if organized into too many divisions), and the system of intermediate appellate courts with successive appeals from one to another, authorized in every case, which is likely to result in excessive expense and unnecessary delay in too many cases. Surely one of the most important accomplishments of any appellate system, both for the benefit of the legal profession and in the public interest, is to solve the problem of getting its dockets up to date and keeping them on a current basis so that cases will be finally determined without undue delay. Missouri experience with the divisional system shows it can be a valuable aid to such accomplishment without sacrificing accuracy of decision.

STATISTICAL SURVEY

RALPH J. TUCKER*

The activity of the court during the past year is disclosed by the following tables. There was relatively little change in the volume of litigation in the past two years, as may be seen by reference to Table I. A somewhat higher percentage of cases was disposed of by opinion in 1938. Comparison with a similar table published in November, 1937,[1] shows a considerable decrease in total litigation from the preceding biennium.

TABLE I[2]

SUPREME COURT DOCKET

January 1, 1937 to December 31, 1938

Number of cases on the docket January 1, 1939 - 391

Number of cases filed in 1937 and 1938

	Civil	*Writs*	*Criminal*	*Total*
1937	340	195	91	626
1938	429	200	68	697

Number of cases disposed of by opinions

	Civil	*Criminal*	*Total*
1937	248	60	308
1938	251	52	303

Number of cases disposed of by motion, etc.

	Civil	*Writs*	*Criminal*	*Total*
1937	305	131	41	477
1938	206	148	24	378

Number of cases under submission 44

Number of cases on docket January 1, 1937 288

Number of cases filed 1937-1938 1323

Number of cases disposed of 1937-1938 1466

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*Chairman of the Board of Student Editors.

1. See *The Work of the Missouri Supreme Court for the Year 1936 (Statistical Survey)* (1937) 2 MO L. REV. 393, 394.

2. Table I was prepared by the clerk of the court.

Table II shows the manner in which the litigation was disposed of. As might perhaps be expected, the judgments of the lower courts were upset somewhat less frequently than they were sustained (though it is not always possible to determine from a mere statistical study every case in which the appellant might have considered the result to have justified his appeal or petition). There was a slight increase from the preceding year in the proportion of successful appeals.

TABLE II

DISPOSITION OF LITIGATION

Judgments affirmed	113
Affirmed on condition (enter remittitur)	5
Awarding of new trial by trial court affirmed	1
Affirmed and remanded	5
Reversed and remanded	58
Reversed with directions to enter decree accord a permanent injunction	1
Reversed and remanded as to one defendant, reversed as to others	1
Reversed and remanded on condition (file remittitur)	1
Judgments reversed	25
Affirmed in part and reversed and remanded in part	1
Writ quashed	17
Writ granted	6
Writ denied	1
Rule absolute	2
Case transferred to court of appeals	16
Record quashed	3
Appeal dismissed	6
Petitioner discharged	4
Petitioner remanded	1
Opinion quashed	1
Peremptory writ issued	1
Record and opinion quashed	5
Motion overruled	1
Respondent ousted from office	1
Writ and prohibition made permanent in part, quashed in part	1
Record and opinion quashed in part	1
Alternative writ quashed and peremptory writ denied	1

Table III is an attempt to show the relative appellate activity in the several fields of law. Though the classification must in many cases represent the arbitrary judgment of the individual attempting the allocation—especially in the many cases clearly involving several legal issues—it is interesting to observe how constant a relationship is maintained from year to year. Thus, in every table presented in this review, approximately one-sixth of

the cases have been classified as concerned primarily with negligence. The percentage of criminal cases has decreased slightly each year (in number from 58 in 1936 and 53 in 1937 to 48 in 1938), whereas practice issues have dominated an increasingly large proportion.

It is not pretended that the table represents relative activity in trial courts. The jurisdictional limitations on the supreme court do not operate uniformly in all branches of the law, a fact which in itself prevents this list from being a fair sample of all litigation.

TABLE III

TOPICAL ANALYSIS OF DECISIONS

Administrative Law	1
Agency	1
Appeal and Error	13
Attorney and Client	2
Bills and Notes	3
Carriers	2
Certiorari Proceedings	5
Constitutional Law	10
Contracts	6
Criminal Law	48
Creditors Rights	2
Domestic Relations	3
Eminent Domain	5
Equity	2
Evidence	4
Habeas Corpus Proceedings	4
Insurance	13
Mandamus Proceedings	2
Master and Servant	5
Mortgages	4
Municipal Corporations	6
Negligence (Automobiles)	14
Other Negligence	20
Partnership	2
Pleading	7
Practice and Procedure	20
Prohibition Proceedings	2
Quo Warranto Proceedings	2
Real Property	21
Receivership	2
Sales	1
School and School Districts	1
States	1
Statutory Construction	16
Taxation	8
Torts (other than negligence)	3
Trusts	5
Wills and Administration	10
Workmen's Compensation	1

The average number of opinions written by the members of the Missouri Supreme Court during the year was sixteen, though there was a very considerable variation between the several judges. The average number of opinions written by commissioners was twenty-eight. There were three *per curiam* opinions. There was slightly less unanimity in the court than during the preceding year. In four cases dissenting opinions were read, and in nine cases one or more judges dissented without opinion.

APPELLATE PRACTICE

CHARLES V. GARNETT*

I. THE JURISDICTION OF THE SUPREME COURT

The supreme court is not a court of general jurisdiction. To the contrary, its jurisdiction is confined and limited by constitutional provisions. Consequently, as again suggested in *Rust Sash & Door Co. v. Gate City Building Corp.*,[1] the court must first inquire into its own jurisdiction, whether or not the question of jurisdiction is raised by the parties. So, also, the record must affirmatively show the existence of jurisdiction. Two decisions of the court, in *Koch v. Meacham*,[2] and *Crescent Planing Mill Co. v. Mueller*,[3] resulted in transfers to the proper court of appeals because of the failure of the record to disclose affirmatively the jurisdictional facts. And, in determining whether or not the jurisdictional facts exist, the court, as is pointed out in *General Theatrical Enterprises v. Lyris*,[4] will not be bound by the amount claimed in the petition, but will look to the entire record to determine the amount actually in dispute.

While it would seem that, where the amount involved is relied upon to confer jurisdiction, the determination of such amount should be a mere matter of simple arithmetic, the trial courts are still granting appeals to the wrong court, due almost entirely to failure to recognize the rule that, as stated in *Ross v. Speed-O Corporation of America*,[5] ". . . where relief

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1. 342 Mo. 206, 114 S. W. (2d) 1023 (1938).
2. 116 S. W. (2d) 16 (Mo. 1938).
3. 117 S. W. (2d) 247 (Mo. 1938).
4. 121 S. W. (2d) 139 (Mo. 1938).
5. 343 Mo. 500, 121 S. W. (2d) 865 (1938).

other than recovery of a money judgment is sought, the 'amount in dispute' is determined by the value in money of the relief to the plaintiff or by the loss to the defendant should the relief be granted." The rule is a simple one and should be emphasized. It is a matter of regret that long delays have resulted in so many cases because of the failure of the trial courts to apply it. The docket of the supreme court is still somewhat congested. The allowance of appeals to that court where the jurisdiction is in the courts of appeal not only adds to that congestion but also inevitably results in a delay of from one to three years for the litigant in the particular case.

Under the clause of the constitution conferring jurisdiction upon the supreme court in cases "involving the title" to real estate, more difficult questions arise. In the case of *Ballenger v. Windes,*[6] decided in 1936, the court held that in an *ordinary* action in ejectment, that is, one which did not raise equitable defenses amounting to an assertion of title, the case involves only questions of possession of real estate as distinguished from title to real estate, and that the jurisdiction is in the appropriate court of appeals. A strong dissenting opinion was filed in that case, pointing to the fact that historically an ejectment action has always been recognized as a proceeding to try title. But the court *en banc* in *Gibbany v. Walker,*[7] after reviewing numerous authorities, some of which are overruled by it, has now approved the doctrine of the *Ballenger* case, and has definitely ruled that "an ordinary action in ejectment does not involve title within the meaning" of the constitutional provision here in question. The same result has also been reached in *Federal Land Bank of St. Louis v. Bross,*[8] where the court again cites the *Ballenger* and *Gibbany* cases in holding that an action in ejectment where "the pleadings do not require the judgment to and the judgment does not adjudicate a title controversy," title is not involved in the constitutional sense. "Title," says the court in the case last cited, "is incidentally or collaterally involved, but this is not sufficient." The holding is again followed in *Frederich v. Tobaben,*[9] the court pointing out that "in this case, judgment was sought and rendered for possession only, defendants did not seek any affirmative relief, and their answers did not even assert a claim of ownership."

While it thus appears that it is not always easy to determine the ap-

6. 338 Mo. 1039, 93 S. W. (2d) 882 (1936).
7. 342 Mo. 156, 113 S. W. (2d) 792 (1938).
8. 116 S. W. (2d) 6 (Mo. 1938).
9. 117 S. W. (2d) 251 (Mo. 1938).

pellate jurisdiction in ejectment actions, the determination is facilitated by the rule, as stated in *State ex rel. Pemberton v. Shain*,[10] that ". . . where the judgment sought or rendered would take title from one litigant and give it to another, title would be involved within the meaning of the Constitution and jurisdiction of the case would be vested in this court." If that rule is kept firmly in mind, much delay in taking appeals to the wrong court can be obviated.

That suits for adjudication of liens are not reviewable in the supreme court on the theory that they involve title to real estate is again pointed out in *Rust Sash & Door Co. v. Gate City Building Corp.*;[11] nor, as was held in that case, can jurisdiction flow from the fact that the amount sought to be established as a lien is in excess of $7500, unless the amount is "in dispute." But, as was held in *Proffer v. Proffer*,[12] suits to contest wills devising real estate fall within the jurisdiction of the supreme court. In that case, the court said: "The cases are numerous that a suit to set aside a deed involves title to real estate, and we can perceive no difference in reason and principle, so far as concerns the question of title, in a suit to set aside a deed that conveys real estate, and a suit to set aside a will that devises real estate."

These and other cases dealing with questions of jurisdiction suggest again the advisability of an analysis both by counsel and by the trial courts of the jurisdictional facts at the time appeals are allowed. All too frequently cases are sent to the wrong court, only to await transfer and the long delays resulting therefrom. If the bench and bar will give proper attention to the question of appellate jurisdiction *before* the appeal is taken, such delays can be avoided.

II. Records and Briefs

Some improvement in the situation with respect to the dismissal of appeals for faulty records and briefs seems to have been made by the bar during the period under review. Dismissals are being reduced in number, and the court, following principles previously declared, has refrained from dismissals unless the infractions of its rules have been of a flagrant type.

In *Harris v. Missouri Pacific R. R. Co.*,[13] the court refused to dismiss an appeal for want of a proper bill of exceptions because of the failure of re-

10. 124 S. W. (2d) 1087 (Mo. 1939).
11. 342 Mo. 206, 114 S. W. (2d) 1023 (1938).
12. 342 Mo. 184, 114 S. W. (2d) 1035 (1938).
13. 342 Mo. 330, 114 S. W. (2d) 988 (1938).

spondent to discover the defect in time, under the rule, to file an additional abstract showing the defect. The court comments: "There is no claim of fraud or sharp practice which prevented plaintiff from discovering the situation sooner. In the circumstances, that plaintiff did not discover the situation in time to comply with Rule 11, cannot alter the rule. Clearly, under the rule, plaintiff waived the right to complain. . . ."

In *Weller v. Searcy*,[14] there were numerous defects in appellant's abstract and brief. The abstract (originally filed in the court of appeals) was typewritten and not printed, the index was improper, and there was no showing as to when and where the suit was filed. The brief, also, was defective and not in strict compliance with the terms of Rule 15. But notwithstanding all these defects, the court refused to dismiss the appeal, commenting that "the abstract and brief cannot be recommended as models but we are of opinion that their defects are not such as to justify the drastic penalty of dismissal of the appeal."

Again, in *Dreyer v. Videmschek*,[15] although the case was one in equity, entitling the court to review the evidence *de novo*, the court refused to dismiss the appeal because the abstract was fragmentary and did not include all of the evidence, the court holding that it could get a fair understanding of the case from the record before it.

These and other cases indicate the trend of the court toward a decision on the merits, notwithstanding infractions of its rules, to the end that the substantial rights of the litigants may not suffer for the sins of their legal representatives.

III. The Writ of Certiorari

The year's decisions have included a large number of cases reaching the court by writ of *certiorari* to the courts of appeal. They are reviewed in detail in the section on Extraordinary Legal Remedies. It is appropriate here, however, to point out that *certiorari* is so often used as a means for reviewing the decisions of the courts of appeal in order to bring them into harmony with controlling decisions of the supreme court that there is a tendency to lose sight of the fact that harmony of decision is not the only ground for review by *certiorari*. In *State ex rel. Pemberton v. Shain*,[16] the writ was issued, not because the court of appeals had rendered an opinion

14. 343 Mo. 768, 123 S. W. (2d) 73 (1938).
15. 123 S. W. (2d) 63 (Mo. 1938).
16. 124 S. W. (2d) (Mo. 1939).

out of harmony with controlling opinions of the supreme court, but because the case was one over which the court of appeals had no jurisdiction, because of the fact that title to real estate was involved. Pointing out the rule that *certiorari* is the proper remedy to confine an appellate court within the limits of its constitutional and legal authority, the proceedings of the court of appeals were quashed, and the supreme court retained jurisdiction of the appeal for the purpose of deciding it upon its merits. In order to determine the fact that the court of appeals was without jurisdiction of the appeal, the supreme court refused to be bound by the rule—applicable to writs issued to preserve harmony of decision—that it was limited to the facts stated in the opinion of the court of appeals, and held that, because "this proceeding in *certiorari* . . . is for the purpose of ascertaining whether the Court of Appeals had jurisdiction . . . the entire record is before us for examination." The same principle is involved in *State ex rel. Terminal R. R. Ass'n v. Hostetter,*[17] and in *State ex rel. Clark v. Shain,*[18] but in both of those cases the court found that the court of appeals had not exceeded its jurisdiction, and reviewed the opinions only for the purpose of determining questions of conflict.

CONSTITUTIONAL LAW

WILLIAM R. COLLINSON*

Our supreme court wrote sixteen opinions in 1938 in which constitutional questions were mentioned or discussed. The court upheld the validity of a constitutional amendment, and held that the amendment superseded a section of the constitution. The court held four statutes and one city ordinance void because they were in conflict with provisions of the constitution, and upheld the validity of three statutes which were challenged as unconstitutional. In three cases the court held that the constitutional point had not been properly raised. The court ruled that five different sections of our state constitution were self-enforcing, in one instance over-

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17. 342 Mo. 859, 119 S. W. (2d) 208 (1938).
18. 343 Mo. 66, 119 S. W. (2d) 971 (1938).

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ruling a previous decision of the court. It is here attempted to classify the decisions under the same general headings used in the digest system.

I. Separation of Powers

In the case of *State ex inf. McKittrick v. Wymore,*[1] the jurisdiction of the court to entertain a *quo warranto* suit, brought to oust the respondent from the office of prosecuting attorney, was challenged by a motion to quash the information. Respondent contended that Section 7, article XIV of the constitution provides for the exclusive manner in which he could be removed from office. This section is a grant of power to the legislature to enact laws to provide for the removal from office of county, city, town and township officials, and under the authority thereof the legislature had enacted Sections 11202-11209, Missouri Revised Statutes 1929, which the respondent contended were the exclusive remedy. The court held that Section 7, article VI, of the constitution, which provides that the supreme court shall have jurisdiction to issue, hear, and consider writs of *quo warranto,* was not limited in any way by Section 7, article XIV, and that, of course, the legislature could not limit the jurisdiction of the court by any statutory enactment. The court laid down the rule that the courts are without authority to create a forfeiture of office, and that the forfeiture can only be created and declared by constitutional or legislative enactments, but that it may be enforced by an action of *quo warranto.*

In a concurring opinion, three judges held that Section 7, article XIV does not exist in the form in which it appears in the Revised Statutes of 1929. As the section is now officially published it combines the full text of the section, as it existed before the Constitutional Convention of 1922-23, with the full text of an amendment thereto, which was submitted by the Convention and duly adopted by the people. The concurring opinion holds that the amendment, although it did not expressly purport to repeal the old section, did "repeal all the section amended and not embraced in the amended form."

In *Ex parte Marsh v. Bartlett,*[2] one of the grounds of attack upon the validity of "Amendment No. 4" (the amendment creating the Conservation Commission) was that it was completely incongruous with our threefold separation of governmental powers, and was in direct conflict with

1. 343 Mo. 98, 119 S. W. (2d) 941 (1938).
2. 343 Mo. 526, 121 S. W. (2d) 737 (1938).

Section 1, article IV: "The legislative power, subject to the limitations herein contained, shall be vested in . . . 'The General Assembly . . .'" The court held that one of the "limitations herein contained" was the initiative and referendum amendment, Section 57, article IV, whereby the people recalled all legislative power and made it subject to the initiative and referendum. The court upheld the validity of the amendment, without going into the question of the *legislative* power of the commission. The opinion does hold that a *regulation* of the commission is the effective law in force, even though in conflict with a specific legislative enactment. It is submitted that the position of this commission of appointed officials, created by a constitution, with power to enact regulations having the force of law, is unique in this country; and this opinion recognizes that the people have withdrawn certain legislative power from their general assembly and vested it in a four-man commission.

In *Ex parte Diemer v. Weiss,*[3] the court held a city ordinance which prohibited picketing invalid for uncertainty and unintelligibility. The court stated that when the language of an act appears to have a meaning, but that the meaning cannot be given any precise application in the circumstances under which it was intended to operate, the courts cannot supply the deficiency or make the act certain.

The case of *State v. Kennedy,*[4] in which the constitutionality of certain sections of the Liquor Control Act was attacked, holds that the wisdom of legislative enactments was not a question for the courts in determining their constitutionality.

In *State ex rel. Phoenix Mut. Life Ins. Co. v. Harris,*[5] the opinion stated that the supreme court's constitutional power is limited to construing a statute as it stands. The construction placed on the statute in question involved no constitutional question. The case is discussed further in the section devoted to insurance law.

II. Delegation of Legislative Power

The case of *Ex parte Marsh v. Bartlett*[6] contains a brief discussion of the constitutionality of delegation of legislative power and the distinction between administrative and legislative powers, but since the case was con-

3. 343 Mo. 626, 122 S. W. (2d) 922 (1938).
4. 343 Mo. 786, 123 S. W. (2d) 118 (1938).
5. 343 Mo. 252, 121 S. W. (2d) 141 (1938).
6. 343 Mo. 526, 121 S. W. (2d) 737 (1938).

cerned with a commission created by the constitution and not by the legislature, the actual question of delegation of legislative power was not before the court.

III. Due Process

In *State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith,*[7] the constitutionality of sections 11071e-25 to 11071e-31, Mo. St. Ann.; Mo. Laws 1933-34; Ex. Sess., pp. 119-136; which provide for the organization of sanitary sewer districts and the financing of sewers by bonds to be paid out of annual rentals, was challenged. One of the objections was that although the bonds were paid by special assessments against all abutting landowners, non-resident landowners could not vote in the bond election. The court overruled this contention on the authority of *Miners' Bank v. Clark*[8] and *Field v. Barber Asphalt Paving Co.*[9] Another constitutional point raised was that the manner in which subdistricts, the bond-issuing agencies, were created did not provide for a hearing for the landowner, and for this reason denied him due process of law. The court pointed out that the subdistricts were simply administrative agencies of the entire sewer district and that the landowner had had his opportunity to be heard upon the organization of the whole district.

In *State v. King,*[10] the negro defendant moved to quash the indictment on the ground that in the selection of the grand jury which indicted him all negroes were systematically excluded, even though there were numerous qualified negroes in St. Louis. The motion to quash was not filed until two and a half months after the grand jury was sworn, and the state cited the provisions of Sections 3514, 3515, Missouri Revised Statutes 1929. These sections provide that exceptions to the competency of grand jurors must be made before they are sworn. The court pointed out that the rule of this statute had been relaxed where the defendant could show facts which excused his failure to do so, and intimated that if the defendant had not been apprehended at the time the grand jury was sworn, this would be a valid excuse. But in this case the defendant had been in custody over three months prior to the impanelling of the grand jury and had had ample opportunity to challenge it before the members were sworn, and no facts to

7. 342 Mo. 365, 115 S. W. (2d) 816 (1938).
8. 252 Mo. 20, 158 S. W. 597 (1913).
9. 194 U. S. 618 (1904).
10. 342 Mo. 975, 119 S. W. (2d) 277 (1938).

excuse his failure were pleaded or proved. The court held that under these circumstances the statute applied, and refused to rule that the indictment should have been quashed. The court did not pass upon the merits of the defendant's motion.[11]

This same question was also before the court in the case of *State v. Richetti.*[12] The defendant in that case moved to quash the indictment because ". . . the Grand Jury wheel from which the names are drawn and were drawn to comprise the Grand Jury that returned the indictment in the present case does not include the names of any citizens of Negro, Italian, Greek, Chinese or Japanese extraction or race, although there are many of such Negro, Italian, Greek, Chinese and Japanese citizens of Jackson County who are duly qualified to serve as Grand Jurors in Jackson County, Missouri . . ." It appears that the defendant was an Italian or of Italian extraction. This motion was filed at the beginning of the trial, long after the grand jury had been sworn. The defendant had been in custody for sixteen weeks before the grand jury was sworn. The court cited the provisions of Sections 3514-15 and discussed their applicability. The exact wording of these sections limits the grounds of challenge of prospective grand jurors to two matters: that the prospective juror is the prosecutor or complainant of a charge against the person making the challenge, or that he is a witness on the part of the prosecutor. And then, of course, these sections provide that the challenges must be made before the jury is sworn. The court pointed out that under previous decisions it was well established that the statute could not deprive the accused of any constitutional rights of challenge which he might have, such as equal protection of the law, and that insofar as the cited sections attempted to limit this right they were unconstitutional. However, the court upheld the limitation of the statute as to the time of making the challenge, and held that in the absence of pleaded and proved facts excusing the failure to challenge the jurors before the panel was sworn, the defendant's attack came too late.[13] The court also stated that they were not ruling that appellant's motion stated a good cause of action as to the exclusion of persons of foreign extraction of other nationalities than appellant.

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11. See Norris v. Alabama, 294 U. S. 587 (1935).
12. 342 Mo. 1015, 119 S. W. (2d) 330 (1938).
13. See also State v. Warner, 165 Mo. 399, 65 S. W. 584 (1901); State v. Bobbst, 269 Mo. 214, 190 S. W. 257 (1916); State v. Shawley, 334 Mo. 352, 67 S. W. (2d) 74 (1933); State v. Logan, 111 S. W. (2d) 110 (Mo. 1937).

In *Hann v. Fitzgerald,*[14] the court held that "neither the revocation of (liquor) licenses issued to plaintiffs and interveners, nor the prosecution of plaintiffs and interveners for selling non-intoxicating beer on Sunday could be an invasion of their property rights" because the right to sell intoxicating liquor is not a natural right and is subject to limitation by the state.

IV. Equal Protection

Although there is a fundamental distinction between the prohibition against local and special laws in the Missouri Constitution (Section 53, article IV) and the equal protection clause of our Federal Constitution (Section 1 of the 14th Amendment), the applicability of the two provisions is generally the same, and they will both be treated under this heading for the purpose of this article.

The case of *State ex rel. Miller v. O'Malley,*[15] holds part of Section 10619, Missouri Revised Statutes 1929, unconstitutional and void as a violation of Section 53, article IV, of the Missouri constitution. Said Section 10619 applies only to cities having over 100,000 inhabitants and differs from the general law applicable to all other parts of the state in that it provides that ballots shall not be destroyed within twelve months after an election if an election contest, grand jury investigation, or prosecution is pending at the expiration of the twelve months. Section 10315, which applies to all the state, provides unconditionally that all ballots shall be destroyed twelve months after an election. The court held that laws relating to crime must operate equally upon every person in the state, and that, therefore, Section 10619 is unconstitutional. Although the opinion, by its express language, condemns the entire statute, it seems reasonable to believe that the court only had in mind the proviso section, since that is the only part of the statute which violates the constitution.

It has frequently been held that Section 53, article IV, does not prevent the enactment of a law which is applicable alike to all of a given class, if the classification is not unreasonable and arbitrary.[16] This case is strong authority for an argument that there could be no "reasonable" classification by statute in any matter involving criminal law or procedure.

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14. 342 Mo. 1166, 119 S. W. (2d) 808 (1938).
15. 342 Mo. 641, 117 S. W. (2d) 319 (1938).
16. See City of Springfield v. Smith, 322 Mo. 1129, 19 S. W. (2d) 1 (1929); Orthwein v. Germania Life Ins. Co., 261 Mo. 650, 170 S. W. 885 (1914); Miners' Bank v. Clark, 252 Mo. 20, 158 S. W. 597 (1913).

In *Idel v. Hamilton-Brown Shoe Co.*,[17] the court held Sections 4601-06, Missouri Revised Statutes 1929, void as being in violation of Section 1 of the Fourteenth Amendment of the Federal Constitution and in violation of Section 53, article IV of our state constitution. These statutes, briefly summarized, declare it unlawful for any corporation to move, abandon or discontinue, to any material extent, any factory or other establishment of the corporation from any place within the state, without first repaying and restoring any and all money, bonds, lands and other property which may have been given or granted as a consideration for the location or construction of the said establishment. The statute provides for heavy penalties, and makes the officers of the corporation guilty of a misdemeanor. This suit was a civil suit for the recovery of money by the trustees of a city "Booster Club," but the plaintiffs relied upon the above sections.

The court held that said sections were unconstitutional because they only applied to corporations which had received a bonus. This decision was based solely upon the case of *State ex rel. Rolston v. Chicago, B. & Q. R. R.*[18] Although criticism and comparison of decisions is hardly within the scope of this article, it should be noted that there is a real distinction between the two cases. The *Rolston* case involved a statute which required a railroad to secure the permission of the board of railroad and warehouse commissioners before abandoning a depot which had been erected in consideration of a donation of land, but did not require this permission to be acquired to abandon a depot which had not been erected in consideration of a bonus. That opinion pointed out that the legislature had a broad discretion with respect to classifying persons and objects for the purpose of legislation, and that the courts can only interfere when it "clearly and beyond a reasonable doubt appears that the legislative power has been transcended and that a particular act arbitrarily, unjustly and unreasonably marks particular persons or things as the objects of burdensome legislation *and exempts therefrom others of the same natural class. . . .*"

It is suggested that in the *Idel* case the court overlooked this last phrase. The court said in the *Rolston* case that there seemed to be no valid reason, of a public nature, to exempt from the provisions of the statute railroads which had erected depots without a grant of land as consideration. By the very nature of the statute in the *Idel* case, and the nature of the evil

17. 343 Mo. 373, 121 S. W. (2d) 817 (1938).
18. 246 Mo. 512, 152 S. W. 28 (1912).

sought to be remedied, there were no other corporations "of the same natural class."

The court specifically cites subdivision 26 of article IV, Section 53, as the constitutional provision which is offended by the legislative act. Subdivision 26 prohibits the granting of "any special or exclusive right, privilege or immunity." The court must have had in mind the word "immunity," since there could be no contention that the statute granted anyone a special or exclusive right or privilege; and it seems the statute in the *Rolston* case was held void because it granted an immunity to railroads which had constructed depots without a bonus. The application of subdivision 26 seems warranted in that case because those railroads were granted an immunity, not from returning the bonus, but from having to apply for and secure the permission of the board. In the *Idel* case it is difficult to see how any immunity was granted to a corporation which had not received a bonus, because there could never be any obligation on it to return something which it had never received.

A fine discussion of the tests and principles by which a legislative act is considered in determining whether it makes a reasonable classification, or whether arbitrary distinctions have been drawn in violation of the equal protection and special or local law provisions of our state and national constitutions, is found in *State v. Kennedy*.[19] This case involved the section of the Liquor Control Act which provides for the issuing of saloon licenses. Under this act licenses may be issued for the sale, by the drink, of malt liquor, containing not more than 5% alcohol, to any person in the state. Licenses for the sale, by the drink, of liquor containing more than 5% alcohol may not be issued to persons in rural districts, in unincorporated towns, nor in towns having less than 500 inhabitants. In cities having 500, but less than 20,000 inhabitants, licenses may be issued only after an affirmative vote of a majority of the qualified voters of the city, and in cities having over 20,000 inhabitants, licenses may be issued without any election. The opinion points out that "acts of the legislature are presumed to be constitutional until the contrary is clearly shown" and that "one who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Applying these principles the court held that the questioned provision (Sec.

19. 343 Mo. 786, 123 S. W. (2d) 118 (1938).

13a, Mo. St. Ann. § 4525g-15, p. 4689) of the Liquor Control Act is not a special or local law, and is constitutional.

V. Construction of Constitutional and Statutory Provisions

The court had before it a very interesting question of constitutional construction in the case of *State ex inf. McKittrick v. Bode.*[20] The constitutional amendment (which was proposition 4 on the ballot, and is popularly referred to as amendment 4) which created the conservation commission, provides that "a director of Conservation shall be appointed by the Commission . . .," and that "the Commission shall determine the qualifications of the director . . ." Section 10, article VIII, of the constitution, which was in force at the time of the adoption of amendment 4, provides that "no person shall be elected or appointed to any office in this state, . . . who shall not have resided in this state one year next preceding his election or appointment." The conservation commission appointed a director who had not been a resident of this state one year prior to his appointment, and this suit in *quo warranto* was instituted to oust him from the office.

The majority opinion first discussed the definition of a "public officer" within the meaning of the constitution, and held that the director is a public officer. The opinion then discussed the rule that constitutional provisions should be harmonized if possible, but pointed out that amendments are usually adopted for the express purpose of making changes in the existing system. In this particular case the language of the amendment is unambiguous in that it provides that the conservation commission shall "determine the qualifications of the director," which is in direct conflict with Section 10, article VIII. Since there is a direct conflict, the latest expression of the people, i. e., the amendment, will prevail.

The separate concurring opinion in which three of the judges joined, held, from an analysis of the duties of the director, that his position was more analogous to that of the president of the state university or one of the state teachers colleges, that he was not a public officer, and that for this reason Section 10, article VIII did not apply.

In *Ex parte Marsh v. Bartlett,*[21] the court again had amendment 4 before it for construction. This was an original proceeding in *habeas corpus,*

20. 342 Mo. 162, 113 S. W. (2d) 805 (1938).
21. 343 Mo. 526, 121 S. W. (2d) 737 (1938).

and the petitioner had been convicted of catching a bass on May 28, 1939, in violation of the express wording of Section 8270, Missouri Revised Statutes 1929. The conservation commission, however, had promulgated a resolution opening the season on bass on that date. Amendment 4 provided that "the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State . . . shall be vested" in a conservation commission, and that "all existing laws inconsistent herewith shall no longer remain in force or effect." The court held that Section 8270, being a legislative regulation of fish, was inconsistent with the amendment and was expressly repealed by its adoption. The court refused to pass on which other sections of the statutory fish and game code were repealed and which were not repealed by the adoption of the amendment, except to indicate that some of the penalty sections were not repealed.

In several cases the court considered whether various provisions of out state constitution were self-enforcing. In *State ex rel. Miller v. O'Malley*,[22] it was held that that portion of Section 3, article VIII, authorizing the use of ballots as evidence in grand jury investigations was self-enforcing. In *State ex inf. McKittrick v. Wymore*,[23] the court approved the ruling in *State ex inf. Norman v. Ellis*,[24] that Section 13, article XIV (providing for a forfeiture of office for nepotism) was self-enforcing, and reversed the ruling in *State ex rel. Letcher v. Dearing*,[25] that Section 24, article XII, (providing for a forfeiture of office for acceptance of a railroad pass) was not self-enforcing. In *Ex parte Marsh v. Bartlett*,[26] the court had a more complicated question before it. Amendment 4 provided that it should be self-enforcing, but also provided that "the General Assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment." No laws had been enacted in "aid of" the amendment at the time this case was decided. The court ruled that the amendment was not held in abeyance until such legislation was enacted, and pointed out, in addition, that there were statutes in force fixing penalties for violation of provisions of the Fish and Game code which would apply to regulation of the commission. In *State ex rel. City of St. Louis v. O'Malley*,[27] the court held, in line with many previous decisions, that Section 21, article II, pro-

22. 342 Mo. 641, 117 S. W. (2d) 319 (1938).
23. 343 Mo. 98, 119 S. W. (2d) 941 (1938).
24. 325 Mo. 154, 28 S. W. (2d) 363 (1930).
25. 253 Mo. 604, 162 S. W. 618 (1913).
26. 343 Mo. 526, 121 S. W. (2d) 737 (1938).
27. 343 Mo. 658, 122 S. W. (2d) 940 (1938).

viding that private property shall not be taken or damaged for public use without just compensation, was self-enforcing.

In *State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith,*[28] the court reiterated the well established rule that where a statute is capable of two interpretations, one of which is constitutional and the other unconstitutional, the courts will interpret the language so as to uphold the constitutionality of the statute.

In *Ex parte Diemer v. Weiss,*[29] the court held that a city ordinance which prohibited picketing was so indefinite, uncertain, and unintelligible that it was void for uncertainty.

VI. Retrospective and Ex Post Facto Laws

In the case of *State ex rel. Clark v. Shain,*[30] the relator claimed that a ruling of the Kansas City Court of Appeals violated Section 15, Article II of our constitution, the section prohibiting the enactment of *ex post facto* and retrospective laws *by the General Assembly.* The court pointed out that this provision of the constitution applies only to legislative acts and not to decisions of courts.[31]

VII. Just Compensation

In the case of *State ex rel. City of St. Louis v. O'Malley,*[32] the court had before it the propriety of a suit brought by an abutting property owner for consequential damage caused by change of grade of a street. The suit as brought was predicated upon Section 7222, Missouri Revised Statutes 1929. The court held that this was not the applicable statute, because the charter of St. Louis provided its own method of assessing damages, which superseded the statutory provision. The court also pointed out that if there were no effective statutory provision for the ascertainment and payment of compensation in an action by the property owner, that Section 21, article II had always been held self-enforcing, and the property owner could bring a common law action that would afford him adequate relief.[33]

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28. 342 Mo. 365, 115 S. W. (2d) 816 (1938).
29. 343 Mo. 626, 122 S. W. (2d) 922 (1938).
30. 343 Mo. 66, 119 S. W. (2d) 971 (1938).
31. Hilgert v. Barber Asphalt Pav. Co., 173 Mo. 319, 72 S. W. 1070 (1903).
32. 343 Mo. 658, 122 S. W. (2d) 940 (1938).
33. Tremayne v. City of St. Louis, 320 Mo. 120, 6 S. W. (2d) 935 (1928).

VIII. Separability of Statutory Provisions

The case of *State ex inf. McKittrick v. Cameron,*[34] involved the constitutionality of the act of 1933 which repealed Sections 9572 and 9574 of the Missouri Revised Statutes 1929, relating to school board elections in cities of over 500,000, and enacted a new section providing for a new method. The court had previously held in the case of *State ex rel. Preisler v. Woodward,*[35] that parts of the amending act were unconstitutional as being in conflict with Section 9, article II, which provides that "all elections shall be free and open." The question raised by this case was whether the act, as it remained after striking out the unconstitutional portions, was the valid controlling law under which an election should have been held and the results ascertained. After examining the act as a whole and the purpose for which it was enacted, the court held that after discarding the part previously held valid there was not enough left to show the legislative intent and to furnish sufficient means to effectuate that intent, and that for that reason the entire act of 1933 was invalid. The court further held that since the repealing clause (repealing Sections 9572 and 9574) was incidental to the rest of the act and the act was unconstitutional, the repealing clause was likewise invalid and the prior general law was left unrepealed.

IX. Miscellaneous

In *Ex parte Marsh v. Bartlett,*[36] the court discussed a number of attacks upon the validity of amendment 4. It was asserted that it violated that part of Section 2, article XV which provides that "No proposed amendment shall contain more than one amended and revised article of this Constitution or one new article which shall not contain more than one subject and matters properly connected therewith," because it did contain more than one subject, and because in the form it was submitted to the voters it contained no expression identifying the number of the particular article or section in the constitution which it was to amend or affect, or to what provision of the constitution it related. The court overruled both these contentions, and in respect to the latter left an inference that the same ruling might not apply to an amendment which was not initiated. The court further ruled that Sections 24 to 34 of Article IV of the constitution

34. 342 Mo. 830, 117 S. W. (2d) 1078 (1938).
35. 340 Mo. 906, 105 S. W. (2d) 912 (1937).
36. 343 Mo. 526, 121 S. W. (2d) 737 (1938).

only apply to legislative acts, and that the numbering and arranging of the sections of the constitution and the amendments thereto is expressly delegated by Section 4 of the schedule of the constitution to the secretary of state as an administrative duty.

It was also contended in this case (by the attorney general) that the amendment was invalid because in the form it was submitted to the voters it did not contain any direct expression identifying it as an amendment to the constitution, or state by its terms that it amended the constitution, and that the voters may have thought they were voting an initiative statute. The court pointed out that in the form it appeared on the ballot it contained a title, prepared by the attorney general, stating that it was a proposal to amend the constitution, and that the last two sentences of the proposal said "The General Assembly may enact any laws in aid of but not inconsistent with the provisions of *this amendment* and all existing laws inconsistent herewith shall no longer remain in force or effect. *This amendment* shall be self-enforcing and go into effect July 1, 1937." Another contention which the court overruled was that the amendment was not valid because in effect it was not organic law but a legislative act unrelated to and incongruous with the constitution.

In the case of *State ex rel. Miller v. O'Malley,*[37] the court held that a statute which was unconstitutional at the time of its enactment was not validated by subsequent constitutional amendment, except, perhaps, in case the amendment ratifies and confirms the statute.

In *State v. Merchant,*[38] the court held that an objection that evidence "was not the best evidence" raised no constitutional point, and that the objection that the admission of the evidence violated the constitutional right of the accused to meet the witnesses against him face to face came too late in the motion for new trial. "Constitutional rights must be seasonably asserted, even in criminal cases."

In *Hann et al. v. Fitzgerald,*[39] the plaintiff sought to enjoin the defendant from enforcing the Sunday provisions of the Intoxicating Liquor Act, Laws 1935, p. 267, Mo. St. Ann., Sections 4525g-16, p. 4689. The petition alleged that the law "violated terms of the Constitution of the State of Missouri and of the United States." The court held that without alleging violation of particular provisions of the constitution, the petition presented no constitutional question.

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37. 342 Mo. 641, 117 S. W. (2d) 319 (1938).
38. 119 S. W. (2d) 303 (Mo. 1938).
39. 342 Mo. 1160, 119 S. W. (2d) 808 (1938).

CRIMINAL LAW

J. HUGO GRIMM*

During the year 1938 the supreme court decided fifty criminal appeals, three less than in the preceding year, affirming the trial courts in thirty-four, or one less than in the preceding like period.

Since practically all crimes now recognized in this state are statutory and the elements of these as well as of the few surviving common law crimes have been defined by the court, and moreover, since the procedure in criminal cases is largely regulated by statutes which the court has had frequent occasion to consider and pass upon, it is obvious that cases of first impression and entirely novel questions of law will not often arise, but the court will in most cases be called upon to apply established rules and principles to novel situations. It is, therefore, not surprising to note that in almost one-half of the cases decided in the past year questions of the admissibility or competency of evidence have not only been passed upon but have also largely determined the decisions. And in some twelve to fifteen cases the decisions turned largely upon the substantial or formal correctness of instructions given or refused, and the sufficiency of indictments and informations received the court's attention in some ten or more cases.

Only such cases will be noted as present matters of unusual public interest, the extension of established principles to new situations or where former views have been modified or entirely changed or disapproved.

I. PRELIMINARY MATTERS

A. *Challange of array or of individual grand juror*

Where a negro defendant was arrested and charged with offense more than three months before the grand jury was impaneled, his objection that negroes were discriminated against in selection of the grand jury, made after the grand jury was sworn, came too late to be considered, in view of Sections 3514 and 3515, Missouri Revised Statutes 1929.[1] But where before the grand jury is sworn the defendant requests and is denied the right to appear before the grand jury and challenge the array or an indi-

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1. State v. King, 342 Mo. 975, 119 S. W. (2d) 277 (1938).

vidual before the jury is sworn, he does not lose his right, but may exercise it later, the statute notwithstanding.[2]

B. *Jurors—competency*

Since jurors must be impartial and unprejudiced, deputy sheriffs are not competent to serve on juries, for their official duties may well conflict or be inconsistent with the duties of a juror.[3]

C. *Indictment or information*

The court followed an unbroken line of decisions holding that an information charging burglary was fatally defective if it failed to allege that the burglary was committed feloniously or with a felonious intent.[4]

II. Trial Procedure

A. *Evidence*

In a prosecution based upon an information charging defendant with an assault upon a certain person with intent to maim, the evidence showed that the assault was committed by throwing acid upon the left side of a moving taxicab while the person alleged to be the object of the assault sat in the right side as a passenger, it being night at the time. It was held that failure to show that defendant knew that the alleged object of the assault was in the taxicab at the time constituted a failure of proof and required the reversal of a judgment of conviction.[5]

Where there is substantial conflicting evidence on the question of whether a confession is voluntary, the issue of voluntariness should in most cases be submitted to the jury, although the court may exclude it not withstanding there is substantial evidence indicating that it was voluntary. Where defendant objects to the admission of a confession on the ground

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2. State v. Richetti, 342 Mo. 1015, 119 S. W. (2d) 330 (1938). This Richetti case and the King case were both decided on August 17, 1938, and in each the opinion was written by Judge Ellison. In each case the court gives the history of sections 3514 and 3515 and the reasons leading to their enactment.
3. State v. Langley, 342 Mo. 447, 116 S. W. (2d) 38 (1938).
4. State v. Pryor, 342 Mo. 951, 119 S. W. (2d) 253 (1938).
5. State v. Martin, 342 Mo. 1089, 119 S. W. (2d) 298 (1938), (1939) 4 Mo. L. Rev. 319. This is a very interesting case. The opinion which was written by Judge Ellison contains a review of pertinent cases, including State v. Williamson, 203 Mo. 591, 102 S. W. 519 (1907), in which Faris, J. concurred only reluctantly in the decision. However, the decided cases seem to fully sustain the opinion in the case under review, and moreover, there is good reason to support the ruling.

that it is involuntary, the court should grant a request for a preliminary hearing out of the presence of the jury.[6]

B. *Instructions*

Where the court in the main instruction tells the jury that if they find the facts as therein set forth, they should find the defendant guilty, but that "unless you so find the facts to be you will acquit the defendant," it need not give the converse of such instructions unless requested to do so by defendant, and it seems that it will not be reversible error to refuse to give such instruction, though requested, where other instructions given by it fully cover the point.[7]

Only a *prima facie* or substantial showing of the elements of self-defense is necessary to raise the issue, and when raised, the burden rests on the state to prevail thereon beyond a reasonable doubt.[8]

It is prejudicial error to instruct the jury to consider together all statements made by the accused relative to the offense after the commission thereof, and to declare that the unfavorable statements are presumed to be true, even where there is evidence tending to establish both the favorable and unfavorable statements.[9]

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6. State v. Gibilterra, 342 Mo. 577, 116 S. W. (2d) 88 (1938). In this case no brief was filed for appellant, but the court, mindful of the duty cast upon it by the statute, carefully examined into the twenty-seven assignments of error set out in the motion for new trial, and finding reversible error sent the case back for retrial. The decision turned entirely upon the failure of the court to instruct the jury with respect to the confessions which had been read in evidence, having refused the instructions asked by defendant to the effect that if they found that the confessions were not voluntarily made, they should disregard them. The court goes into the whole matter of confessions and the procedure in the trial court with regard to them with painstaking care and cites practically all the Missouri cases pertaining to the matter, reviewing many of them.

7. State v. Fraley, 342 Mo. 442, 116 S. W. (2d) 17 (1938). This case is important because it is a clear departure from the earlier cases, principal among them State v. Sloan, 309 Mo. 498, 274 S. W. 734 (1925). It seems to the writer that the court could have gone further and held that the trial court might, in some complicated cases at any rate, be required to give the converse of the state's instructions even without a request.

8. State v. Strawther, 342 Mo. 618, 116 S. W. (2d) 133 (1938); State v. Davis, 342 Mo. 594, 116 S. W. (2d) 110 (1938). In the former case Judge Leedy reviews the Missouri cases on this point.

9. State v. Busch, 342 Mo. 959, 119 S. W. (2d) 265 (1938). In this case Commissioner Cooley's opinion, adopted by the court, condemns an instruction which formerly was freely given. The instruction was sharply criticized by the court in State v. Johnson, 333 Mo. 1008, 1013, 63 S. W. (2d) 1000, 1002 (1933), approving a motion for rehearing. Later, in State v. Duncan, 336 Mo. 600, 80 S. W. (2d) 147 (1935), the court, speaking through Judge Ellison, again condemned the instructions as invading the province of the jury.

EQUITY

SAMUEL H. LIBERMAN*

The cases in equity decided by the supreme court in 1938 were not marked by any new developments in this branch of jurisprudence, and involved merely the application of recognized principles to the particular facts.

Since the appellate court in equity reviews the facts as well as the law, it is not surprising to find that the opinions of the court in the past year dealt exhaustively with the facts. None the less, one is impressed with the careful consideration and analysis which the opinions disclose are given to the facts, and with the frequency of the occasions on which the conclusions drawn by the supreme court upon the facts differ from the conclusions drawn by the chancellor. Where the findings of fact of the trial court lead to an unreasonable or inequitable result, the supreme court has not hesitated to substitute its own findings. In *Peikert v. Repple*,[1] the court stated it would not hesitate to make findings adverse to the chancellor, where the result reached by the chancellor upon the facts did not seem reasonable.

To the writer, this attitude seems a most salutary one, and indicates the presence of that active, critical spirit, characteristic of the inquiring mind bent only upon the purpose of ascertaining the true facts to the end that equity be done.

It is believed that the bar, generally, is in wholehearted accord with this approach to the decision of equity cases on appeal, consistently manifested by the supreme court.

In several cases it was held that where a creditor having a *bona fide* claim against a debtor is a party to a fraudulent scheme with the debtor, whereby the debtor makes a conveyance to him for the purpose of defeating the claims of another creditor, the claim of the creditor who is a party to the fraud will be postponed and subordinated to the claim of the creditor whom it was intended to defraud.[2]

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1. 342 Mo. 274, 114 S. W. (2d) 999 (1938).

2. Peikert v. Repple, 342 Mo. 274, 114 S. W. (2d) 999 (1938); Citizens Bank of Pleasant Hill v. Robinson, 342 Mo. 697, 117 S. W (2d) 263 (1938).

The principle of equitable estoppel was applied in *Boone v. Oetting*,[3] where it was held that remaindermen who had accepted the proceeds of a void partition sale with knowledge of the facts were estopped in equity from asserting any further interest in the lands which had been the subject of the sale.

An interesting discussion of option contracts is found in the case of *Suhre v. Busch*,[4] which was a suit in equity to compel specific performance of an agreement for the resale of stock purchased from the plaintiff by the defendant. At the time defendant purchased the stock from the plaintiff, he agreed that the plaintiff could repurchase the same at a specified price at any time within a specified period. There was a limited extension of that period subsequently given. Within the time as extended, plaintiff appeared at the office of the defendant and was advised that the defendant was ill and not in the office. Plaintiff made no tender of the amount required to be paid in order to repurchase the stock. Two years later, and after the stock had become more valuable, plaintiff tendered the amount required, and when the tender was rejected, brought suit for specific performance. In reversing the decree for the plaintiff, the supreme court held that tender of performance upon the part of the plaintiff was essential, as time was clearly of the essence. The court further held that even if tender within the specified time was excused by reason of the acts of the defendant, the plaintiff only had a reasonable time thereafter in which to tender performance, and that the period of two years during which she waited, and in which period the stock had become much more valuable, was not a reasonable time. The court further held that since the evidence clearly demonstrated that the plaintiff was not able to tender performance, she could not recover.

In *Long v. Long*,[5] a contract was entered into under which a business was given to the defendant and the defendant was to make certain stipulated payments. The defendant failed to make such payments, and cancellation of the contract was sought. It was held that plaintiff had an adequate remedy at law in damages for the amounts which the defendant had agreed to pay, and the failure of the defendant to make the payments did not justify cancellation of the contract.

In several cases, it was held that mere lapse of time was not sufficient

3. 342 Mo. 269, 114 S. W. (2d) 981 (1938).
4. 343 Mo. 170, 120 S. W. (2d) 47 (1938).
5. 121 S. W. (2d) 800 (Mo. 1938).

to support the defense of laches. In *Bickel v. Argyle Inv. Co.*,[6] the court said:

"Laches . . . cannot be invoked to defeat justice; and it will be applied only where the enforcement of the right asserted would work injustice."[7] "The defense that a claim is stale is purely an equitable one and unless there is some natural justice back of it a court of equity will not entertain it."[8] Before laches can be invoked, ". . . the delay must have been such as practically to preclude the court from arriving at a safe conclusion as to the truth of the matters in controversy, and thus make the doing of equity either doubtful or impossible . . ."[9] Mere lapse of time is not sufficient to support laches.

In *Waugh v. Williams*,[10] the court reaffirmed the principle that where a court of equity has once taken jurisdiction, it will not relax jurisdiction until full and complete justice has been done.

In *State ex rel. North St. Louis Trust Co. v. Wolfe*,[11] it was held that all persons legally or beneficially interested in the subject matter of a suit in equity, no matter how numerous, should be made parties, so there might be a complete decree binding upon all.

EVIDENCE

J. A. WALDEN*

I. JUDICIAL NOTICE

The doctrine of judicial notice has apparently not been extended to any new fields by the supreme court during the year 1938.

Judicial notice was taken that bank deposits were guaranteed by the United States Government, under its laws, on May 13, 1935.[1] It was further held that in determining whether a petition against directors of a failed bank sufficiently charged their assent to the reception of deposits, the

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6. 343 Mo. 456, 121 S. W. (2d) 803 (1938).
7. 21 C. J., § 212, p. 214.
8. Bucher v. Hohl, 199 Mo. 320, 330, 97 S. W. 922, 925 (1906).
9. 21 C. J., § 219, p. 223.
10. 342 Mo. 903, 119 S. W. (2d) 223 (1938).
11. 343 Mo. 580, 122 S. W. (2d) 909 (1938).

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1. Peikert v. Repple, 342 Mo. 274, 114 S. W. (2d) 999 (1938).

court was required to consider certain statutory provisions in connection with the specific allegations of the petition, and that the court would take judicial notice of the statutes without their being pleaded.[2]

Judicial notice of land descriptions in government surveys was taken,[3] and this doctrine was applied to make certain a land description which would have otherwise been uncertain, because of the failure to recite the county and state in which the land was located, for the reason that the court judicially knows a given section, township and range to be in a definite county in this state, but does not judicially know any such location outside this state.[4]

As to values, the court judicially noticed that the term "money", as commonly used and understood, is something which has value,[5] and in considering provisions of a will, it was held that it was common knowledge that a $500.00 interest-bearing security, bequeathed therein, might be selling on the market either at a discount or at a premium, and that accrued interest thereon would have to be taken into consideration in determining its value.[6]

The doctrine of judicial notice was applied to certain matters of common knowledge—notably, that a person or object can be recognized for a period of about thirty minutes after sunset and for a similar period before sunrise. It was further stated that the time of sunrise on a particular morning would be judicially noticed.[7]

And the court, in *Pearrow v. Thompson,*[8] judicially noticed that the trend from rural to urban life had caused the roar of motors in cities to replace the more pastoral sounds of the barn-yards, and that dwellers in large cities necessarily must know more about machinery than about farm animals.

The court judicially noticed geographical facts, locations and boundaries, in that it judicially noticed that Bolivar is only twenty-eight miles from Springfield, on State Highway 13, and that a person travelling at ordinary speed, by automobile, could have been in Springfield at 11:00

2. Hutcherson v. Thompson, 343 Mo. 884, 123 S. W. (2d) 142 (1938).
3. Frazier v. Shantz Real Estate and Inv. Co., 343 Mo. 861, 123 S. W. (2d) 124 (1938).
4. Curry v. Crull, 342 Mo. 553, 116 S. W. (2d) 125 (1938).
5. State v. Gabriel, 342 Mo. 519, 116 S. W. (2d) 75 (1938).
6. Marr v. Marr, 342 Mo. 656, 117 S. W. (2d) 230 (1938).
7. State v. Perkins, 342 Mo. 560, 116 S. W. (2d) 80 (1938).
8. 343 Mo. 490, 121 S. W. (2d) 811 (1938).

A. M. and in Bolivar in the afternoon by 4:00, 3:00 or even 2:00 o'clock, a period of time which no doubt may be reduced in the future.[9]

Further, the court, where proof showed that a murder had been committed adjacent to U. S. Highway 63, about two miles south of Pomona, judicially noticed that Pomona was in Howell County, Missouri, and that the point described was also in Howell County, and it was stated that the court could judicially notice the location of roads in the highway system and the distances therealong, in line with the general doctrine authorizing the court to note judicially facts which are a part of the general knowledge of the country, and which are duly authenticated in public repositories open to all.[10]

Judicially noticing habits, acts and customs of the people, the court, in *Buehler v. Festus Mercantile Co.*,[11] recognized that it is common knowledge that occupants of automobiles rely on a driver, who has exclusive control and management of the vehicle, to exercise the required degree of care in its control and management, the court saying that for that reason, it could not be a hard and fast rule that the occupants were negligent in so doing. And the court further noticed that automobiles on through-streets pass over intersections at a considerable rate of speed, on the assumption that cars approaching on intersecting streets governed by stop-signs will obey the signs.[12]

In *Houck v. Little River Drainage District*,[13] the court took judicial notice of its own records in a former case, to learn how a rock road had its origin and when it was constructed. And again, judicial notice was taken to determine that an appeal in another case had been dismissed.[14]

In one instance at least, the court refused to extend the doctrine, by holding that it could not take judicial notice of the professional reputation of defendant's attorney.[15]

II. Presumption, Inference and Burden of Proof

Every adult is presumed to be of sound mind, and capable of committing crime.[16]

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9. State v. Ashcraft, 342 Mo. 608, 116 S. W. (2d) 128 (1938).
10. State v. Kenyon, 343 Mo. 1168, 126 S. W. (2d) 245 (1938).
11. 343 Mo. 139, 119 S. W. (2d) 961 (1938).
12. Hangge v. Umbright, 119 S. W. (2d) 382 (Mo. 1938).
13. 343 Mo. 28, 119 S. W. (2d) 826 (1938).
14. State v. Bockman, 124 S. W. (2d) 1205 (Mo. 1939).
15. State v. Davit, 343 Mo. 1151, 125 S. W. (2d) 47 (1938).
16. State v. Corrington, 116 S. W. (2d) 87 (Mo. 1938).

Concerning presumptions as to knowledge of law and fact, it was held that a voter is presumed to know the law, but not a candidate's qualifications for office—such as his age, residence, want of naturalization and political or religious beliefs.[17]

A mortgagee who held a junior deed of trust was charged with a knowledge of the law with respect to the rights of the holder of the senior deed of trust, where in the absence of fraud or deception, said holder released the senior deed of trust and accepted a renewal deed of trust.[18]

In *Russell v. Franks*,[19] the court states that the failure of a party, having knowledge of facts and circumstances vitally affecting the issues on trial, to testify in his own behalf or to call other witnesses within his power, who have knowledge of such facts and circumstances, raises a strong presumption and inference that the testimony of such persons would have been unfavorable and damaging to the party failing to proffer them, but in this suit to set aside a trust deed as in fraud of creditors, no unfavorable presumptions against the defendants arose, because of their failure to testify, until the plaintiff had made a *prima facie* case.

The court held that the burden of proving legitimacy rests on the party alleging it, and that any presumption of legitimacy affected only the duty of going forward with the evidence, and not the burden of proof.[20]

And the burden of proof as to fraud, which is an affirmative defense, was held to be upon the party setting up the defense.[21]

Concerning the presumption in favor of official acts, the court held that where the Liquor Control Act made it mandatory upon the attorney general to enforce the Act, without requiring him to await the request or direction of the governor, the presumption of right and lawful conduct on the part of an assistant attorney general, in signing a complaint under the Act, would apply, even though there was no request from the governor.[22]

III. Admissions and Declarations

In a controversy over property, where the plaintiff claimed the defendant's testator had only a life interest therein, and that plaintiff was

17. State *ex inf.* McKittrick v. Cameron, 342 Mo. 830, 117 S. W. (2d) 1078 (1938).
18. State *ex rel.* Breit v. Shain, 342 Mo. 1148, 119 S. W. (2d) 758 (1938).
19. 343 Mo. 159, 120 S. W. (2d) 37 (1938).
20. Clapper v. Lakin, 343 Mo. 710, 123 S. W. (2d) 27 (1938).
21. Greene v. Spitzer, 343 Mo. 751, 123 S. W. (2d) 57 (1938).
22. State v. Kennedy, 343 Mo. 786, 123 S. W. (2d) 118 (1938).

entitled to a share therein as a remainderman after the life estate, a statement by the defendant's testator that everything she had came to her under the will of her deceased husband, which gave her a life estate, was admissible as a statement opposed to her interest, and was admissible against her devisee, the defendant.[23]

In *State v. King*,[24] the statement of defendant to a police officer that a taxi driver, upon his arrival in the city, had told him that if the driver was needed, to call him, was admissible against the interest of the defendant, after the defendant had denied that he knew the taxi driver in question or had ridden with him.

IV. Parol and Extrinsic Evidence, Affecting Writings

In *Robinson v. Field*,[25] the rule is reaffirmed that the consideration expressed in a deed is open to explanation by parol evidence.

V. Opinion Evidence

The court, in two cases, reaffirmed the well-settled rule that before a lay witness can testify to the insanity of a person, he must first detail facts and acts upon which he bases the opinion, but that this is not necessary where the witness testifies to the sanity of the person.[26]

In *Berry v. Kansas City Public Service Co.*,[27] it was held that a physician may give his expert opinion of the condition of a patient, founded on his observation or on the patient's present subjective symptoms, or both, and in giving his opinion, the physician may testify not only as to what he observed but as to what the patient told him about his present symptoms, but such opinion must not be based on the statement of the patient as to his past physical condition or symptoms, this being mere hearsay.

In *Jones v. Chicago, Burlington & Quincy R. R.*,[28] the court said that although the ultimate issuable fact for the jury was whether the bridge in question was adequate for the purposes it was expected to serve, nevertheless, expert testimony by an engineer upon the question was not an

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23. Graham v. Stroh, 342 Mo. 686, 117 S. W. (2d) 258 (1938).
24. 342 Mo. 1067, 119 S. W. (2d) 322 (1938).
25. 342 Mo. 778, 117 S. W. (2d) 308 (1938).
26. State v. Todd, 342 Mo. 601, 116 S. W. (2d) 113 (1938); Platt v. Platt, 343 Mo. 745, 123 S. W. (2d) 54 (1938).
27. 341 Mo. 658, 121 S. W. (2d) 825 (1938).
28. 343 Mo. 1104, 125 S. W. (2d) 5 (1938).

invasion of the province of the jury, and that the jury was entitled to the aid of such expert testimony in resolving conflicts in evidence upon this issue. It was further stated that where the source and extent of the respective experiences and capacity of expert witnesses was revealed to the jury, the question of whether the experts lacked the necessary knowledge and information of the facts upon which to have based a worthwhile opinion affected only the weight and value of their testimony and not its competency.

Where a witness disclaims ability to form an opinion on a subject, such as speed, he should not be urged or allowed to guess on the matter under the guise of an opinion.[29]

VI. Weight and Sufficiency of Evidence

Where facts tending to show self-defense are intermingled with the State's evidence, the defendant can claim advantage of them.[30]

Concerning the credibility of witnesses, the court, in *Siegel v. Missouri-Kansas-Texas R. R.*,[31] held that a brakeman who had testified in his action for injuries received while engaged in a switching movement, that he was rendered unconscious from the time of the injury for almost a month, and did not have testimonial knowledge of switching movements subsequent to the fall, could not give testimony of probative value concerning the switching movements of the train subsequent to his fall. It was said that where a witness testifies to contradictory facts, the one cancels the other, and no evidence is left from the witness on that point.

In *Clapper v. Lakin*,[32] the rule is recognized that a party is not ordinarily concluded by his testimony in a case where subsequently, upon some excuse of mistake, oversight, misunderstanding or lack of definite recollection, he denies his former statements, but that if the party makes no correction, or merely states facts diametrically opposed without explanation, he is concluded. In the instant case, it was held that the testimony of one party plaintiff, as to her age, was not so conclusive as to bind other plaintiffs.

In *Rucker v. Alton R. R.*,[33] the defendant had produced testimony that the deceased stopped before entering on defendant's tracks, and in absence

29. Gorman v. Franklin, 117 S. W. (2d) 289 (Mo. 1938).
30. State v. Davis, 342 Mo. 594, 116 S. W. (2d) 110 (1938).
31. 342 Mo. 1130, 119 S. W. (2d) 376 (1938).
32. Clapper v. Lakin, 343 Mo. 710, 123 S. W. (2d) 27 (1938).
33. 343 Mo. 929, 123 S. W. (2d) 24 (1938).

of the showing of a mistake as to such testimony, the defendant was concluded thereby, and was not entitled to an instruction predicated on decedent's not stopping before entering on the track.

In *Platt v. Platt*,[34] the court, in an action to cancel a deed, where respondents had introduced a witness who testified to grantor's mental capacity, held that in the absence of countervailing testimony, the respondents could not ask the court to disregard the testimony of this witness for whom they stood sponsor.

VII. Documentary Evidence

In *Lynch v. Baldwin*,[35] the court held it was not error to introduce photographs of the plaintiff, showing him wearing a Thomas collar extending from his waist to his mouth, while he was being treated for spinal injuries, there being nothing grewsome about the pictures, tending to excite sympathy. The pictures were admissible as showing the extent of the inconvenience and pain suffered by plaintiff, in the necessary treatment of his injuries. The court, however, expressly failed to approve the use of such pictures, saying merely that their introduction was not enough to require a reversal, under the circumstances, and adding that the device could have been explained to the jury.

VIII. Witnesses

A. *Competency*

In *State v. Morefield*,[36] it was stated that the rule that one coindictee may not testify against another does not apply where the defendants were charged in separate indictments, although charged with the same offense.

B. *Examination*

The trial court has a discretionary right to control the length of a cross-examination and its course, and will not be charged with error in the absence of the abuse of discretion.[37]

A witness, on cross-examination, may be asked any question which tends to test his accuracy, veracity or credibility, or to shake his credit by

34. Platt v. Platt, 343 Mo. 745, 123 S. W. (2d) 54 (1938).
35. 117 S. W. (2d) 273 (Mo. 1938).
36. 342 Mo. 1059, 119 S. W. (2d) 315 (1938).
37. State v. Davit, 343 Mo. 1151, 125 S. W. (2d) 47 (1938).

injuring his character, and he may be compelled to answer, no matter how irrelevant or disgraceful it may be, except in instances where the answer might expose him to a criminal charge, but the examiner is bound by the answer. However, questions tending to show merely that the witness has been charged with crime and arrested, without conviction, cannot be asked.[38]

In *State v. Busch*,[39] it was held that where defendant's witness had testified that he was in jail at a certain time, it was not error for the state to ask, on cross-examination, if he was now out on bond on the charge for which he was jailed, since it could not possibly do any harm.

C. *Credibility, impeachment and corroboration*

In *State v. McDonald*,[40] it was held that a motion to require the production and inspection of the minutes of a grand jury, for the purpose of providing defendant with a possible means of impeachment of witness, was properly denied, and it was further added that a grand jury's minutes are not substantive proof of a defendant's guilt or innocence, and are not admissible in evidence as such.

It was held that while a witness may be cross-examined as to specific acts, for the purpose of impeachment, he nevertheless may not be impeached by independent proof of such specific acts, where the proof is offered solely for the purpose of impeachment; and where a witness has testified to certain facts, he may be asked, on cross-examination, about extra judicial statements he may have made to the contrary, and if he denies same or equivocates, he may be impeached on rebuttal, by proof of such extra judicial statements.[41]

In *State v. Pyle*,[42] it was held not to be error to exclude evidence offered by the defendant in chief of prior specific acts of misconduct on the part of the prosecutrix, in a forcible rape case, which were offered for the purpose of impeachment of the prosecutrix as a witness.

In *Arnold v. Alton R. R.*,[43] an attorney who had represented an organization which plaintiff at one time sued, and who did not live in plaintiff's community, was offered as an impeaching witness on the question of plain-

38. State v. Perkins, 342 Mo. 560, 116 S. W. (2d) 80 (1938).
39. 342 Mo. 959, 119 S. W. (2d) 265 (1938).
40. 342 Mo. 998, 119 S. W. (2d) 286 (1938).
41. State v. Perkins, 342 Mo. 560, 116 S. W. (2d) 80 (1938).
42. 343 Mo. 876, 123 S. W. (2d) 166 (1938).
43. 343 Mo. 1049, 124 S. W. (2d) 1092 (1938).

tiff's reputation for truth and veracity. The attorney had made a trip to plaintiff's home town to investigate plaintiff's reputation for truth and veracity, and it was held that the discretion of the trial court in permitting the witness to testify as an impeaching witness would not be disturbed, it being stated that the knowledge of the general reputation, necessary to make the impeaching witness competent, depended on the means and extent of his information, rather than on the place of his residence.

In a suit involving title to land, where defendant contradicted testimony given by him in a divorce suit between plaintiff and defendant some four months prior, and disclaimed recollection of the testimony there given by him as to the title to the land, such contradictions and disclaimer could be considered in determining the weight and credibility to be given defendant's testimony.[44]

In *O'Malley v. City of St. Louis,*[45] it was held that where plaintiff had testified that the light where she tripped was poor, her prior written statement that the absence of light at the place where she tripped did not cause her to fall, was entitled to consideration as substantive evidence. The effect of this ruling will no doubt encourage the practice of procuring, where possible, written statements from parties to law suits, prior to the trial of such suits. This is apparently an extension of the rule heretofore stated in *Pulitzer v. Chapman,*[46] that prior contradictory statements made in a deposition in the same case by a witness who testified at the trial, and which were used to impeach his testimony at the trial, might be accepted as substantive proof of the facts stated.

IX. Relevancy and Res Gestae

In *State v. Richetti,*[47] it was held that to warrant the admission in evidence of a weapon as the weapon with which a crime was committed, clear, certain and positive proof is not required, but that all that was necessary to justify the admission of the weapon was a *prima facie* showing of identity and connection with the crime—as, that the weapon was found near the time and scene of the crime, and might have been used in committing the crime. Such *prima facie* showing is sufficient without connecting the

44. Rhoads v. Rhoads, 342 Mo. 934, 119 S. W. (2d) 247 (1938).
45. 343 Mo. 14, 119 S. W. (2d) 785 (1938).
46. 85 S. W. (2d) 400 (Mo. 1935).
47. 342 Mo. 1015, 119 S. W. (2d) 330 (1938).

weapon with the accused. The case further holds that it was not necessary to produce the photographer who took finger prints on a bottle, used for the purpose of comparison with finger prints of the defendant, when the expert who was present when the pictures of the prints on the bottle were taken was present at the trial and identified the photograph.

In *Sconce v. Jones*,[48] the court reaffirms and restates, in a carefully written opinion, the doctrine of *res gestae*. In that case, plaintiff, who was riding in a truck which went off the road, was so penned in the cab of the truck that he was not released therefrom for sometime after the occurrence. The court had under consideration the admissibility of statements explanatory of the occurrence, made by plaintiff sometime after the occurrence, in response to questions, and while plaintiff was still penned in the cab of the truck. The court declares that there are two kinds of statements which may be received in evidence as *res gestae*—first, that type of statement which can be classified as a verbal act, and which is actually a part of the transaction under investigation; second, statements made by a person involved in or present at an accident, in which are declared the circumstances of the injury, at or after its occurrence. Such statements are admissible as *res gestae* when the utterance is a spontaneous and sincere response to the actual sensations and perceptions of the speaker, produced by the shock. Exceptions to the second class of admissible statements are, first, that the statements cannot be a reflective narration of past events; second, they cannot be a mere opinion; and third, they cannot be a conclusion of fact, reached by the process of reasoning on the part of the speaker, from other facts. The true test is not the time or place of the statement, but whether it is a spontaneous statement, produced by the event itself, time and place being merely the fact evidentiary of its spontaneous character. Both classes of statements are exceptions to the hearsay rule and if not admissible as *res gestae*, would be excluded, because the party making the statement was not subject to cross-examination at the time of making it. In the instant case, plaintiff's statement was that the brakes on the truck had grabbed, which statement involved a process of reasoning on the part of the plaintiff, making the statement inadmissible as *res gestae*, under the third exception above set out.

Examples of statements which were admitted as *res gestae*, apparently following the classification of verbal acts, are found in the case of *State v.*

48. 343 Mo. 362, 121 S. W. (2d) 777 (1938).

Allen,[49] where the defendant, in the course of an attempted robbery in which witness's husband was killed, and shortly before the shooting, threatened to rape witness, the threat being admitted as *res gestae;* and in *State v. Peters,*[50] where the court held that the acts and declarations of persons actually committing a robbery of participants in a gambling game in a barn, were admissible against the defendant as *res gestae,* where the defendant stood guard outside the barn during the robbery. In this case, the defendant was a co-conspirator with the actual robbers.

In *State ex rel. Metropolitan Life Insurance Co. v. Shain,*[51] a suit was instituted upon an insurance policy, based upon the theory that the insured was dead after the lapse of more than seven years, and that he died within the time that the policy was in force. The unsworn statement of third persons, such as insured's landlord, during the seven-year period, were introduced in evidence, upon the theory that they were admissible as *res gestae.* The court held that such statements were improperly admitted, since they were not spontaneous, instinctive exclamations or utterances, directly arising out of the act, event, transaction or occurrence itself, and so closely connected therewith as to be a very part thereof, and did not exclude any idea of design, afterthought or premeditation, or of being a mere retrospective narration or restatement. Apparently, such statements could not have possibly come under the second classification of statements admissible as *res gestae,* as set out in *Sconce v. Jones,* and the court ruled in effect that they could not constitute a verbal act, under the first classification there set out.

X. Criminal Law

A. *Acts and declarations of co-conspirators and co-defendants*

In *State v. Pierson,*[52] the court ruled that a conspiracy may be proven by evidence of co-conspirators who were also accomplices.

In *State v. Richetti,*[53] the court overruled prior decisions to hold that the acts and declarations of a co-conspirator, made before the inception of a conspiracy, are not admissible against a conspirator who afterwards enters a conspiracy with the one making the declarations or performing the

49. 342 Mo. 1043, 119 S. W. (2d) 304 (1938).
50. 123 S. W. (2d) 34 (Mo. 1938).
51. 343 Mo. 435, 121 S. W. (2d) 789 (1938).
52. 343 Mo. 841, 123 S. W. (2d) 149 (1938).
53. 342 Mo. 1015, 119 S. W. (2d) 330 (1938).

acts, but that such acts and declarations of a co-conspirator are admissible if made after the inception of the conspiracy, although the defendant did not join the conspiracy until after the acts and declarations were made.

B. *Admissions and confessions*

In *State v. Todd,*[54] the well-settled rule that voluntary statements or admissions of the accused against his interests are admissible in evidence against him, is reaffirmed.

In *State v. Hesselmeyer,*[55] the court held that where there is a joint charge pending against husband and wife, a statement of one, made out of the presence of the other, is not admissible against the other; and it was further held, in *State v. Williamson,*[56] that a promise of leniency, made after a confession, cannot make it inadmissible, nor is a confession inadmissible which is made after a prior confession which was inadmissible because of inducements, unless a connection exists between the latter confession and the prior inducements. However, the influence which induced the prior confession is presumed to continue until its cessation is affirmatively shown, and evidence to overcome or rebut this presumption of its continued existence must be clear, strong and satisfactory.

In *State v. King,*[57] it was held that a confession induced by a promise that the making of it would save a third person from mistreatment is not thereby invalidated.

Concerning admissions by silence, the court, in *State v. Kissinger,*[58] ruled that where the silence of the accused is maintained under such circumstances that only a guilty party would remain silent, statements made in his presence, which are not denied, are admissible as implied admissions. But where the statement was by the wife of the accused, in response to a question addressed to her by an officer, this was not true, since it would have been an intrusion for the defendant to have interfered in a conversation to which he was not a party, and it is further held that in no event is silence an admission where the defendant is in either actual or constructive custody of an officer at the time.

In *State v. Gibilterra,*[59] the court re-examined and reconsidered the

54. 342 Mo. 601, 116 S. W. (2d) 113 (1938).
55. 343 Mo. 797, 123 S. W. (2d) 90 (1938).
56. 343 Mo. 732, 123 S. W. (2d) 42 (1938).
57. 342 Mo. 1067, 119 S. W. (2d) 322 (1938).
58. 343 Mo. 781, 123 S. W. (2d) 81 (1938).
59. 342 Mo. 577, 116 S. W. (2d) 88 (1938).

proper procedure to be followed, where an objection is made to the voluntary character of a confession, and stated the rule to be that if a defendant objects to the confession on the ground that it was not voluntary, and requests a preliminary hearing out of the presence of the jury, it should be granted. At such hearing, if the evidence is substantial and conflicting, the court may determine the mixed question of the law and fact by weighing the evidence, and should rule as he is convinced by the evidence. The court is not bound to refer the question to the jury if there is substantial evidence that the confession is voluntary, but where there is substantial conflicting evidence and the question is close, the voluntary nature of the confession should be referred to the jury, and the court can still exclude it if the evidence produced before the jury, together with that introduced on preliminary examination, convinces the court that the confession was involuntary. The appellate court will defer to the trial court's ruling, unless manifest error appears therein. If all the evidence upon this question shows a confession admitted in evidence to be voluntary, the court need not instruct the jury in relation to its voluntary character, even though requested, and where there is a conflict of evidence upon the question of whether the confession is voluntary, even then the court need not give such an instruction as a part of the law of the case, but should give such an instruction if requested, and if the requested instruction be not in proper form, the court should prepare and give a proper instruction on the question, unless sufficiently covered by other instructions.

C. *Proof of other offenses, and character of accused*

In *State v. King*,[60] the court reiterated the rule that proof of independent crimes should be excluded in a criminal prosecution, because they deprive the defendant of the presumption of innocence and of his constitutional right to be informed by indictment or information of the charge against him. The exceptions are stated to be that where the independent crimes show (1) motive, (2) intent, or (3) in statutory rape, prior acts between the same parties constitute a foundation of an antecedent probability. In the instant case, the defendant, testifying for himself under a charge of statutory rape, said in effect that he had not had sexual intercourse with any of the girls at the school where he was employed, and which the prosecuting witness attended. The state was allowed to cross-

60. 342 Mo. 975, 119 S. W. (2d) 277 (1938).

examine defendant upon this point, and to show that he had sexual intercourse with another pupil prior to the offense with which he was charged. The court said that proof of such acts, prior to the offense charged, was corroborative, and while the state could not have shown such prior acts in chief, still, since the defendant initially made a showing on the question, the state was entitled to meet it on rebuttal, and it could not, under such circumstances, be contended that such rebuttal evidence was impeachment upon an immaterial matter. The court distinguishes the case of *State v. Buxton*,[61] saying that there is a difference in fact between the two cases, but also saying that the Buxton case squarely upheld defendant's contention in this case, so leaving it doubtful whether the Buxton case was in effect overruled. Under ordinary circumstances, it is said that where the state injects collateral crimes or other immaterial matters into its examination, for the purpose of discrediting defendant, the state is bound by defendant's answers and cannot impeach him. However, this is not true where, as here, the defendant tenders the issue, since then the state has the right to meet it.

EXTRAORDINARY LEGAL REMEDIES

RUSH H. LIMBAUGH*

I. CERTIORARI

A. *To Review Record of Proceedings in Circuit Court*

After a comparatively recent original announcement by the Supreme Court of Missouri of the doctrine that under the constitution of this state the supreme court has authority to quash judgments of the courts of appeals that conflict with prior decisions of the supreme court,[1] by far the

61. 324 Mo. 78, 22 S. W. (2d) 635 (1929).

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1. The first case in which the Supreme Court of Missouri exercised its power to quash an opinion of a court of appeals through the use of the extraordinary writ of *certiorari* and stated the doctrine under which it held that it was vested with such power was State *ex rel.* Curtis v. Broaddus, 238 Mo. 189, 142 S. W. 340 (1911). For a discussion of the origin and early application of the doctrine, see McBaine, *Certiorari From the Missouri Supreme Court to the Courts of Appeals* (1916) 13 U. OF MO. BULL. L. SER. 30; Graves, *Certiorari as Used by the Supreme Court in the Interest of Harmony of Opinion and Uniformity of the Law* (1922) 24 U. OF MO. BULL. L. SER. 3.

most frequent use made of the writ of *certiorari* by the supreme court has been in the exercise of its power under that doctrine. But that it may also use the extraordinary writ of *certiorari* to review and quash proceedings in other inferior courts where such courts are proceeding beyond their jurisdiction or have entered orders or judgments that are illegal and beyond their power[2] is demonstrated by three instances of the use of *certiorari* against circuit courts during the year 1938.[3]

In *State ex rel. Miller v. O'Malley,*[4] it was held that *certiorari* may be used against a circuit judge of St. Louis to review his action in denying an application for the issuance of a subpoena *duces tecum* commanding the Secretary of the Board of Election Commissioners to produce ballots in connection with a grand jury investigation of an election, and after reviewing the action in that case the writ of *certiorari* was quashed.

Under a writ of *certiorari* in *State ex rel. Renner v. Alford,*[5] the court reviewed an order of a circuit court overruling a motion to dismiss a *habeas corpus* action brought by a mother to recover the custody of a child adopted in a proceeding in which it was alleged the mother was not notified as required by law. The supreme court held that the trial court properly overruled the motion to dismiss, for a decree for the adoption of a child may be collaterally attacked by a parent in a *habeas corpus* proceeding where the parent was not a party to the adoption proceedings and had no action or constructive notice thereof.

A statute[6] fixes the date when registration for any election in Kansas City shall close. Three days after a close of registration for a city election a prospective voter asked the Board of Election Commissioners to permit her to register. The Board refused. After various intermediate proceedings the circuit court ordered the board to permit the applicant to register. The board applied to the supreme court for a writ of *certiorari* to have the record and order of the circuit court quashed. Upon a review of the record under the writ of the supreme court, in *State ex rel. Woodmansee v. Ridge,*[7]

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2. For a discussion of the use of the writ of *certiorari* generally see McBaine, *The Writ of Certiorari in Missouri* (1915) 6 U. OF MO. BULL. L. SER. 3. For a statement of the rule in a late case, see State *ex rel.* Woodmansee v. Ridge, 343 Mo. 702, 123 S. W. (2d) 20 (1938).

3. State *ex rel.* Miller v. O'Malley, 342 Mo. 641, 117 S. W. (2d) 319 (1938); State *ex rel.* Renner v. Alford, 343 Mo. 576, 122 S. W. (2d) 905 (1938); State *ex rel.* Woodmansee v. Ridge, 343 Mo. 702, 123 S. W. (2d) 20 (1938).

4. 342 Mo. 641, 117 S. W. (2d) 319 (1938).

5. 343 Mo. 576, 122 S. W. (2d) 905 (1938).

6. Mo. Laws 1937, pp. 294-341.

7. 343 Mo. 702, 123 S. W. (2d) 20 (1938).

held that the statute fixing the time when registration should close was mandatory, and quashed the record of the circuit court ordering the board to register the applicant on the ground that the action of the circuit court was beyond its powers.

B. *To Review Opinions of Courts of Appeals*

During 1938 the supreme court reviewed the opinions of the courts of appeals on *certiorari* in eighteen cases. In nine of these cases the opinions of the courts of appeals were quashed,[8] and in nine of the opinions reviewed the writs of *certiorari* were quashed.[9] Of the cases reviewed, six were determined by division one of the court,[10] three by division two of the court,[11] and eight by the court *en banc*.[12]

Although the opinions in most of these cases repeat principles already well known, there are instances where these principles are enlarged, and,

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8. State *ex rel.* Heuring v. Allen, 342 Mo. 81, 112 S. W. (2d) 843 (1938); State *ex rel.* Security Benefit Ass'n v. Shain, 342 Mo. 199, 114 S. W. (2d) 965 (1938); State *ex rel.* Steinbruegge v. Hostetter, 342 Mo. 341, 115 S. W. (2d) 802 (1938); State *ex rel.* Trading Post Co. v. Shain, 342 Mo. 588, 116 S. W. (2d) 99 (1938); State *ex rel.* Prudential Ins. Co. of America v. Shain, 342 Mo. 1049, 119 S. W. (2d) 309 (1938); State *ex rel.* Breit v. Shain, 342 Mo. 1148, 119 S. W. (2d) 758 (1938); State *ex rel.* Fourcade v. Shain, 342 Mo. 1190, 119 S. W. (2d) 788 (1938); State *ex rel.* Metropolitan Life Ins. Co. v. Shain, 343 Mo. 435, 121 S. W. (2d) 789 (1938); State *ex rel.* Clark v. Shain, 343 Mo. 542, 122 S. W. (2d) 882 (1938).

9. State *ex rel.* Washington Fidelity National Ins. Co. v. Hostetter, 342 Mo. 843, 117 S. W. (2d) 1083 (1938); State *ex rel.* Terminal R. R. Ass'n v. Hostetter, 342 Mo. 859, 119 S. W. (2d) 208 (1938); State *ex rel.* Public Serv. Comm. v. Shain, 342 Mo. 867, 119 S. W. (2d) 220 (1938); State *ex rel.* Ben Hur Life Ass'n v. Shain, 342 Mo. 928, 119 S. W. (2d) 236 (1938); State *ex rel.* Reeves v. Shain, 343 Mo. 550, 122 S. W. (2d) 885 (1938); State *ex rel.* Brotherhood of L. F. & E. v. Shain, 343 Mo. 666, 123 S. W. (2d) 1 (1938); State *ex rel.* Clark v. Shain, 343 Mo. 66, 119 S. W. (2d) 971 (1938); State *ex rel.* Wors v. Hostetter, 343 Mo. 945, 124 S. W. (2d) 1072 (1938).

10. State *ex rel.* Heuring v. Allen, 342 Mo. 81, 112 S. W. (2d) 843 (1938); State *ex rel.* Security Benefit Ass'n v. Shain, 342 Mo. 199, 114 S. W. (2d) 965 (1938); State *ex rel.* Washington Fidelity National Ins. Co. v. Hostetter, 342 Mo. 843, 117 S. W. (2d) 1083 (1938); State *ex rel.* Metropolitan Life Ins. Co. v. Shain, 343 Mo. 435, 121 S. W. (2d) 789 (1938); State *ex rel.* Brotherhood of L. F. & E. v. Shain, 343 Mo. 666, 123 S. W. (2d) 1 (1938); State *ex rel.* Fourcade v. Shain, 342 Mo. 1190, 119 S. W. (2d) 788 (1938).

11. State *ex rel.* Ben Hur Life Ass'n v. Shain, 342 Mo. 928, 119 S. W. (2d) 236 (1938); State *ex rel.* Prudential Ins. Co. of America v. Shain, 342 Mo. 1049, 119 S. W. (2d) 309 (1938); State *ex rel.* Trading Post Co. v. Shain, 342 Mo. 588, 116 S. W. (2d) 99 (1938).

12 State *ex rel.* Steinbruegge v. Hostetter, 342 Mo. 341, 115 S. W. (2d) 802 (1938); State *ex rel.* Terminal R. R. Ass'n v. Hostetter, 342 Mo. 859, 119 S. W. (2d) 208 (1938); State *ex rel.* Public Serv. Comm. v. Shain, 342 Mo. 867, 119 S. W. (2d) 220 (1938); State *ex rel.* Breit v. Shain, 342 Mo. 1148, 119 S. W. (2d) 758 (1938); State *ex rel.* Clark v. Shain, 343 Mo. 542, 122 S. W. (2d) 882 (1938); State *ex rel.* Reeves v. Shain, 343 Mo. 550, 122 S. W. (2d) 885 (1938); State *ex rel.* Wors v. Hostetter, 343 Mo. 945, 124 S. W. (2d) 1072 (1938); State *ex rel.* Missouri-Kansas-Texas R. R. Co. v. Shain, 343 Mo. 961, 124 S. W. (2d) 1141 (1939).

for the reason that there is some value to be derived from an application of any principle to a different set of facts, reference is hereby made to the most important points considered in each case.

In *State ex rel. Ben Hur Life Ass'n v. Shain,*[13] *State ex rel. Metropolitan Life Ins. Co. v. Shain,*[14] and *State ex rel. Missouri-Kansas-Texas R. R. Co. v. Shain,*[15] the court repeated that the object of the constitutional provision giving the supreme court a superintending control over the courts of appeals through the use of *certiorari* was to secure uniformity in judicial decisions and preserve harmony in the law.

Although it was said in *State ex rel. Prudential Ins. Co. of America v. Shain,*[16] that in a *certiorari* proceeding the supreme court is concerned only with the question of conflict, and in *State ex rel. Brotherhood of L. F. & E. v. Shain,*[17] that the court was concerned only with whether or not the opinion of the court of appeals is in conflict with the last controlling decision of the supreme court on the points ruled, and in *State ex rel. Ben Hur Life Ass'n v. Shain,*[18] that on a writ of *certiorari* the determination of error is limited to the finding of a conflict between the opinion of the court of appeals under review and the latest ruling opinion of the supreme court on the subject, it should be added, as was said in *State ex rel. Clark v. Shain,*[19] that when a court of appeals had jurisdiction otherwise to render the particular judgment under review, the supreme court cannot quash its opinion unless that opinion contravenes some controlling opinion of the supreme court. Conversely, as the court properly ruled in *State ex rel. Clark v. Shain,*[20] and in *State ex rel. Terminal R. R. Ass'n. v. Hostetter,*[21] when a court of appeals has exercised jurisdiction not vested in it, or when it exceeds its jurisdiction by undertaking to exercise unauthorized powers, the supreme court has the power under a writ of *certiorari* to quash its opinion, even though there is no conflict between the opinion of the court of appeals and the controlling decisions of the supreme court.

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13. 342 Mo. 928, 119 S. W. (2d) 236 (1938).
14. 343 Mo. 435, 121 S. W. (2d) 789 (1938).
15. 343 Mo. 961, 124 S. W. (2d) 1141 (1939).
16. 342 Mo. 1049, 119 S. W. (2d) 309 (1938).
17. 343 Mo. 666, 123 S. W. (2d) 1 (1938).
18. 342 Mo. 928, 119 S. W. (2d) 236 (1938).
19. 343 Mo. 542, 122 S. W. (2d) 882 (1938).
20. *Ibid.*
21. 342 Mo. 859, 119 S. W. (2d) 208 (1938).

1. What Constitutes Conflict

(a) *Construction of statutes*

In *State ex rel. Wors v. Hostetter,*[22] it was held that the courts of appeals, within the range of their respective jurisdictions, have the same rights as the supreme court to construe statutes. In *State ex rel. Heuring v. Allen,*[23] it was held that the supreme court will not construe a statute on *certiorari* where the statute has not been construed by a court of appeals in a manner that contravenes a construction of the statute made in some prior decision of the supreme court. In *State ex rel. Clark v. Shain,*[24] the court laid down the following rules as to the construction of statutes in *certiorari* proceedings by the supreme court to review decisions of the courts of appeals: First, when a statute or contract plainly has but one meaning under canons of construction established by the supreme court and a court of appeals gives such statute or contract some other meaning, the opinion of the court of appeals will be quashed. Second, when a statute or contract is open to construction because its meaning is debatable, a court of appeals has the right to apply established canons of construction to it and to declare its meaning according to its own views; and even though the supreme court does not approve such construction it cannot quash the opinion of the court of appeals unless it contravenes a prior controlling decision based on the same or similar facts, or unless it is in conflict with a prior decision of the supreme court construing the same statute or contract. With these rules the opinion in *State ex rel. Wors v. Hostetter*[25] is in accord. Applying these rules, it was held in *State ex rel. Heuring v. Allen,*[26] that a decision by a court of appeals that there is nothing to prohibit an applicant for insurance from contracting for the kind of insurance he wants and that interested parties may make such a contract of insurance as they wish, contravenes decisions of the supreme court determining that statutes relating to nonforfeiture of insurance policies cannot be waived and that the parties are limited to methods fixed in the statute for application of reserves upon default of a premium payment.

In *State ex rel. Security Benefit Ass'n. v. Shain,*[27] an opinion of a

22. 343 Mo. 945, 124 S. W. (2d) 1072 (1938).
23. 342 Mo. 81, 112 S. W. (2d) 843 (1938).
24. 343 Mo. 542, 122 S. W. (2d) 882 (1938).
25. 343 Mo. 945, 124 S. W. (2d) 1072 (1938).
26. 342 Mo. 81, 112 S. W. (2d) 843 (1938).
27. 342 Mo. 199, 114 S. W. (2d) 965 (1938).

court of appeals to the effect that a foreign insurer claiming the privileges of fraternal insurance societies was liable as an old line company and its certificates issued to members constituted the contracts with the members because of the failure of the company to comply with the fraternal insurance code in issuing its certificates, was quashed because it was in conflict with prior decisions of the supreme court[28] holding that under the provisions of the applicable statute[29] the rights of members of a fraternal benefit society are not fixed by the terms of the certificate issued, as is true in the case of policies issued by old line life insurance companies, but depend also on the constitution and by-laws of the society, which, with the certificate, constitute the contract.

(b) *Prior contrary decision of same point*

There is a conflict of decision where an opinion of a court of appeals rules differently from the supreme court's ruling as to the legal effect of the same or substantially similar facts or contravenes a general principle of law stated in a prior controlling decision of the supreme court. This was held in *State ex rel. Heuring v. Allen.*[30] Thus, where the supreme court has held that a homicide is within the *res gestae* of the initial crime and is an emanation thereof, as where a robber has been compelled to flee without obtaining any property,[31] a decision by a court of appeals, in a suit for double indemnity on a policy where the deceased was killed in a neutral position where burglary had been attempted, contrary to that principle is such conflict as will call for the quashing of the opinion of the court of appeals.[32] Thus, also, where a court of appeals held in an action for damages that proof of knowledge of a certain condition was sufficient to take the case to the jury on the question of notice, when the supreme court had held that under similar facts evidence of notice was insufficient for the jury,[33] there was conflict, as decided in *State ex rel. Trading Post Co. v. Shain.*[34] And there was conflict where a court of appeals, after having found that there was no controversy as to fact that plaintiff in an action for loss of

28. State *ex rel.* Knights & Ladies of Security v. Allen, 306 Mo. 633, 269 S. W. 388 (1924); Biggs v. Modern Woodmen of America, 336 Mo. 879, 82 S. W. (2d) 898 (1935).
29. Mo. REV. STAT. (1929) § 5997.
30. 342 Mo. 81, 112 S. W. (2d) 843 (1938).
31. See State v. Adams, 339 Mo. 926, 98 S. W. (2d) 632 (1936).
32. State *ex rel.* Prudential Ins. Co. of America v. Shain, 342 Mo. 1049, 119 S. W. (2d) 309 (1938).
33. McKeighan v. Kline's Inc., 339 Mo. 523, 98 S. W. (2d) 555 (1936).
34. 342 Mo. 588, 116 S. W. (2d) 99 (1938).

his injured wife's services was damaged because of her injuries, failed to follow a previous decision of the supreme court[35] holding in a similar case that the failure of plaintiff's main instruction to require a finding of such fact was not prejudicial error warranting reversal of judgment on verdict for plaintiff.[36] Also, there was conflict, as decided in *State ex rel. Steinbruegge v. Hostetter*,[37] where a court of appeals, in an action for injuries to a pedestrian struck by a dealer's automobile while being driven by a salesman, held that the presumption that the automobile was driven by a regular employee of the dealer within the scope of his employment did not disappear upon the dealer's introducing substantial evidence to the contrary, when the supreme court in a former controlling opinion[38] had ruled otherwise.

(c) *Decision contrary to rule of supreme court*

In *State ex rel. Clark v. Shain*,[39] it was held that a decision of a court of appeals in an action to disbar an attorney that both the jurisdiction of the court to disbar and the exercise of that jurisdiction are limited by statute, and the action to disbar was based on the statute, was in conflict with the former opinions of the supreme court[40] which held that the action was based on the rules of the supreme court.[41] Announcing a new reason why an opinion of a court of appeals will be quashed on *certiorari*, the court held that the opinion of the court of appeals was in conflict with

35. Pandjiris v. Oliver Cadillac Co., 339 Mo. 726, 98 S. W. (2d) 978 (1936).
36. State *ex rel.* Fourcade v. Shain, 342 Mo. 1190, 119 S. W. (2d) 788 (1938).
37. 342 Mo. 341, 115 S. W. (2d) 802 (1938).
38. Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854 (1917).
39. 343 Mo. 542, 122 S. W. (2d) 882 (1938).
40. State *ex rel.* McKittrick v. Dudley & Co., 340 Mo. 852, 102 S. W. (2d) 895 (1937), (1938) 3 Mo. L. REV. 391; Clark v. Austin, 340 Mo. 467, 101 S. W. (2d) 977 (1937); *In re* Sparrow, 338 Mo. 203, 90 S. W. (2d) 401 (1935); *In re* Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933).
41. The opinion of the court of appeals in the case reviewed (*In re* Williams, 113 S. W. (2d) 353 (Mo. App. 1938) was held to be particularly out of harmony with the following language in *In re* Richards, 333 Mo. 907, 63 S. W. (2d) 672, 675 (1933): "It is not always easy to determine what objects are naturally within the range or orbit of a particular department of government, but it will scarcely be denied that a primary object essentially within the orbit of the judicial department is that courts properly function in the administration of justice, for which purpose they were created, and in the light of judicial history they cannot long continue to do this without power to admit and disbar attorneys who from time immemorial have in a peculiar sense been regarded as their officers. Since the object sought is not naturally within the orbit of the legislative department, the power to accomplish it is in its exercise judicial and not legislative, although in the harmonious co-ordination of powers necessary to effectuate the aim and end of government it may be regulated by statutes to aid in the accomplishment of the object but not to frustrate or destroy it."

certain specific rules of the supreme court, which rules have the force and effect of a decision of the supreme court, and when a court of appeals decides a case contrary thereto its opinion will be quashed.

2. What Does Not Constitute Conflict

In *State ex rel. Terminal R. R. Ass'n. v. Hostetter,*[42] it was held that in an action for damages, where plaintiff offered no instructions except on the measure of damages and the court of appeals decided that the jury was sufficiently instructed on the issues by instructions given at the request of the defendant, there was no conflict with prior decisions by the supreme court, for under such decisions[43] the way is left open for the courts of appeals and trial courts to decide whether the lack of instructions for plaintiff's side of the case prejudiced, and when a court of appeals so decides, its decision is not in conflict with the opinion of the supreme court. The same rule holds relative to a denial to defendant's attorney of the right to comment on plaintiff's failure to offer instructions.

In *State ex rel. Clark v. Shain,*[44] it was held that even though it is urged that a construction of a bond by a court of appeals is erroneous and in violation of constitutional rights, the supreme court cannot interfere on *certiorari* if the court of appeals had jurisdiction to construe the bond and its decision did not conflict with a prior decision of the supreme court. *State ex rel. Brotherhood of L. F. & E. v. Shain*[45] held that in an action on a disability benefit insurance contract, where the trial court tried the case on the theory that the company was an old line company and the court of appeals affirmed the case, although it held the company was a fraternal benefit association, there was no conflict between the court of appeals' decision and prior decisions of the supreme court that recovery cannot be had in an appellate court on a different theory from that on which the case was tried. In *State ex rel. Wors v. Hostetter,*[46] it was held that where the supreme court had never ruled whether the Workmen's Compensation Commission in awarding compensation necessarily decided that employee was not engaged in interstate commerce when injured, even though there was no such issue presented or expressly decided, a decision by a court of ap-

42. 342 Mo. 859, 119 S. W. (2d) 208 (1938).
43. Freeman v. Berberich, 332 Mo. 831, 60 S. W. (2d) 393 (1933); Dorman v. East St. Louis Ry. Co., 335 Mo. 1082, 75 S. W. (2d) 854 (1934); Yerger v. Smith, 338 Mo. 140, 89 S. W. (2d) 66 (1935).
44. 343 Mo. 66, 119 S. W. (2d) 971 (1938).
45. 343 Mo. 666, 123 S. W. (2d) 1 (1938).
46. 343 Mo. 945, 124 S. W. (2d) 1072 (1939).

peals that an award against employee's immediate employer and acceptance thereof by employee barred employee's action under Federal Employer's Liability Act against third persons, did not contravene decisions of the supreme court. *State ex rel. Missouri-Kansas-Texas R. R. Co. v. Shain*[47] held that a decision of a court of appeals that an interstate railroad's employee who was struck by an automobile while waiting for a street car to carry reports relating to cars moving in interstate transportation from a yard office in Kansas to state office in Missouri was not engaged in "interstate commerce" within the Federal Employer's Liability Act and his death was not compensable under the state law, did not conflict with any supreme court opinion.

3. What May be Considered on Certiorari

Quoting its own language used in a former case,[48] the supreme court in *State ex rel. Public Serv. Comm. v. Shain,*[49] said that in a *certiorari* case it looked only to the opinion of the court of appeals for the facts. And in *State ex rel. Brotherhood of L. F. & E. v. Shain,*[50] the court said that as to the facts it was limited to such as appear in the opinion of the court of appeals, though when reference is made in an opinion of the court of appeals to pleadings and documents, these may also be considered as though set out in full in the opinion.[51]

In *State ex rel. Terminal R. R. Ass'n. v. Hostetter,*[52] while recognizing the rule that it was confined to the opinion of the court of appeals for the "evidentiary facts," the court pointed out that *certiorari* brings up the record proper in the case for review for the purpose of having jurisdictional questions determined, and said that for the purpose of determining whether the court of appeals had jurisdiction to render a certain opinion the supreme court could examine the record proper for errors, even though such errors are not disclosed by the opinion of the judges.

4. What May Not Be Considered

In *State ex rel. Public Serv. Comm. v. Shain,*[53] the court reannounced the rule that evidence not considered by the court of appeals is not reviewable by the supreme court on *certiorari.*

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47. 343 Mo. 961, 124 S. W. (2d) 1141 (1939).
48. State *ex rel.* Missouri Mut. Ass'n v. Allen, 336 Mo. 352, 78 S. W. (2d) 862 (1935).
49. 342 Mo. 867, 119 S. W. (2d) 220 (1938).
50. 343 Mo. 666, 123 S. W. (2d) 1 (1938).
51. *Ibid.*
52. 342 Mo. 859, 119 S. W. (2d) 208 (1938).
53. 342 Mo. 867, 119 S. W. (2d) 220 (1938).

In *State ex rel. Metropolitan Life Ins. Co. v. Shain,*[54] it was held that an alleged error not assigned in or considered by the court of appeals cannot be considered by the supreme court on *certiorari,* the concern of the reviewing court being that of rulings actually made, either expressly or by necessary implication.

In *State ex rel. Brotherhood of L. F. & E. v. Shain,*[55] the court ruled that cases decided by the courts of appeals cannot be considered in *certiorari* to quash an opinion. The same ruling was made in *State ex rel. Ben Hur Life Ass'n v. Shain.*[56]

In *State ex rel. Wors v. Hostetter,*[57] and in *State ex rel. Ben Hur Life Ass'n v. Shain,*[58] it was held that the supreme court on *certiorari* cannot consider cases from other states bearing on the construction of a statute by the court of appeals in its opinion under review, the object of the supreme court in such case being that of determining whether the court of appeals opinion contravenes a ruling of the supreme court of this state.

That a point not considered or discussed and a contention not decided by a court of appeals cannot be considered in the supreme court on *certiorari* was held in *State ex rel. Public Serv. Comm. v. Shain,*[59] and in *State ex rel. Breit v. Shain.*[60]

It is not within the power of the supreme court in reviewing a decision of a court of appeals on *certiorari* to determine whether the court of appeals correctly ruled the question under review.[61] Neither is it within the province of the supreme court on *certiorari* to determine whether the ruling of the court of appeals was sound or unsound.[62]

5. What Supreme Court Cannot Do on Certiorari

In *State ex rel. Clark v. Shain,*[63] the supreme court held that under the constitution it does not have appellate jurisdiction over the courts of appeals, and, as said in *State ex rel. Terminal R. R. Ass'n v. Hostetter,*[64] in

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54. 343 Mo. 435, 121 S. W. (2d) 789 (1938).
55. 343 Mo. 666, 123 S. W. (2d) 1 (1938).
56. 342 Mo. 928, 119 S. W. (2d) 236 (1938).
57. 343 Mo. 945, 124 S. W. (2d) 1072 (1939).
58. 342 Mo. 928, 119 S. W. (2d) 236 (1938).
59. 342 Mo. 867, 119 S. W. (2d) 220 (1938).
60. 342 Mo. 1148, 119 S. W. (2d) 758 (1938).
61. State *ex rel.* Ben Hur Life Ass'n v. Shain, 342 Mo. 928, 119 S. W. (2d) 236 (1938).
62. State *ex rel.* Public Serv. Comm. v. Shain, 342 Mo. 867, 119 S. W. (2d) 220 (1938).
63. 343 Mo. 542, 122 S. W. 882 (1938).
64. 342 Mo. 859, 119 S. W. (2d) 208 (1938).

certiorari cases the supreme court does not sit as a court of appeals, but as a supervisory court.

Even though a court of appeals uses unnecessary language in stating its decision, if its decision does not conflict with a prior controlling decision of the supreme court, the latter will not alter the language used by the court of appeals, for, as held in *State ex rel. Terminal R. R. Ass'n. v. Hostetter*,[65] it is not the function of the supreme court on *certiorari* to edit the opinions of the courts of appeals.

II. Habeas Corpus

A. *Extradition of Paroled Convict*

In 1938 the supreme court announced few new principles of the law of *habeas corpus*, but provided several illustrations of the use of the writ.

In *Ex parte Kabrich*,[66] it was held in a *habeas corpus* proceeding by a person who was paroled in California and permitted to go to Missouri, where he was later convicted, and who, following his release from the Missouri penitentiary, was arrested and placed in the custody of California officials under an extradition warrant issued by the governor of Missouri, and sought release therefrom on the ground that California waived jurisdiction by requiring him to leave that state, that even though California lost jurisdiction of the person of petitioner he was under the restraint of the conditions of the parole, and when petitioner violated a condition of the parole he acquired the status of an escaped convict and as such was subject to extradition under the federal Constitution, and should be remanded to the California officials.

The technique of drafting amendments to the constitution of Missouri was considered in *Ex parte Marsh v. Bartlett*,[67] where the amendment providing for the creation of a conservation commission was declared valid. Contending that the amendment had no section number and contained no means of identifying it as an amendment to any particular article or section of the constitution and was, therefore, invalid and of no effect, a justice of the peace issued a warrant for the arrest of a person charged with violating the old law which the amendment to the constitution sought to abrogate. After he had been convicted he brought a *habeas corpus* proceeding to se-

65. *Ibid.*
66. 343 Mo. 196, 120 S. W. (2d) 42 (1938).
67. 343 Mo. 526, 121 S. W. (2d) 737 (1938).

cure his release, claiming that the amendment nullified the statute he was charged with violating. The court upheld the validity of the amendment, ruled that it repealed the law under which the petitioner was convicted, and directed that he be discharged.

In *Ex parte Carney v. Ramsey,*[68] and *Ex parte England,*[69] it was held in *habeas corpus* proceedings that by virtue of the provisions of the "three-fourths" statute[70] any convict who has served three-fourths of his sentence in an orderly and peaceable manner, without having any infraction or prison rules recorded against him, should be discharged as if he had served his full sentence.

An ordinance of the City of Kirkwood provided that it was unlawful to interfere with the operation of an established business by picketing. Petitioner was convicted in the city court for violating the ordinance and sought his discharge by an action in *habeas corpus.* In *Ex parte Diemer v. Weiss,*[71] it was held an ordinance of a regulatory nature must be clear, definite and certain, so that the average man may, with due care, after reading the same, understand whether or not he will incur a penalty for his actions, and since the ordinance under which the petitioner was convicted was vague, indefinite and uncertain, it was void, and the petitioner should be discharged.

III. MANDAMUS

An appeal in a *mandamus* action decided in 1937 but not becoming final until 1938 was that of *State ex rel. Gaines v. Canada,*[72] which was a proceeding by a negro to compel the registrar and curators of the University of Missouri to admit him as a student in the School of Law. Holding that the established public policy of the state was to segregate the white and negro races for the purpose of education in the common and high schools, and that, since there was no constitutional provision against the authority of the legislature to enact laws providing for such separation for the purpose of higher education, and since there is a legislative declaration of a purpose to establish a law school for negroes at Lincoln University whenever necessary or practical, and pending the establishment of such a school

68. 343 Mo. 556, 122 S. W. (2d) 888 (1938).
69. 122 S. W. (2d) 890 (Mo. 1938).
70. MO. REV. STAT. (1929) § 8442.
71. 343 Mo. 626, 122 S. W. (2d) 922 (1938).
72. 342 Mo. 121, 113 S. W. (2d) 783 (1938).

adequate provision had been made for the legal education of negro students in recognized schools outside of this state, the court affirmed the judgment of the circuit court quashing the alternative writ and denying a peremptory writ.[73]

In *State ex rel. Consolidated School Dist. v. Smith*,[74] there was an original *mandamus* proceeding to compel the state auditor to register an issuance of refunding bonds of a consolidated school district. The consolidated district embraced what was originally six separate common school districts, all but one of which had outstanding bonds at the time of consolidation. The consolidated district issued bonds to refund all the outstanding issues which were in default. Applying to consolidated school districts the general rule that where one corporation goes entirely out of existence by being annexed to or merged in another corporation, then the subsisting corporation will be entitled to all the property and answerable for all the liabilities, the court held that upon the consolidation of the several districts their indentities disappeared and a new entity arose, which assumed the old debts, and in refunding such debts, which process merely changed the form of an existing debt, the provisions of the constitution of Missouri relative to incurring indebtedness do not apply, and it was not necessary to submit the proposition of issuing the refunding bonds to a vote of the people in the district. As a result of the decision that the peremptory writ issue compelling the registration of the bonds, the property in the district which had no outstanding bonds at the time of the consolidation became liable with that in the other districts for taxation for the payment of the refunding bonds.

State ex rel. Melrose Sewer Dist. v. Smith[75] was an original proceeding in *mandamus* to compel the state auditor to register bonds of a sewer district of St. Louis County created under statutory authority.[76] A part of the funds for the construction of sewers in the district was contributed by WPA, and the amount thereof together with that raised by a bond issue against the property in the district exceeded the constitutional limitation

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73. This cause went to the Supreme Court of the United States on writ of *certiorari* and was there reversed and remanded on the ground that by the operation of the laws of Missouri a privilege for white law students which is denied to negroes because of their race is contrary to the "equal protection" provision of the Constitution of the United States, and this notwithstanding the fact that there is but a limited demand in Missouri for legal education of negroes. State of Missouri *ex rel.* Gaines v. Canada, 305 U. S. 337 (1938).

74. 343 Mo. 288, 121 S. W. (2d) 160 (1938).

75. 343 Mo. 207, 120 S. W. (2d) 1102 (1938).

76. Mo. Laws 1933-1934, Ex. Sess., p. 119.

of indebtedness of the district. The court held that the act under which the district was incorporated presupposed that outside aid would be forthcoming, and in view of that fact the court incorporating the district could properly approve the project.

In *State ex rel. Howe v. Hughes,*[77] an alleged creditor of an estate in the process of administration obtained an alternative writ of *mandamus* in an original proceeding in the supreme court to compel the probate court to set aside an order of partial distribution made in such estate and to recall the property distributed pursuant to the order. Following the established rule that *mandamus* cannot be used to perform the office of an appeal or writ of error, the court held that the order of partial distribution made by the probate court was not as a ministerial act but it was entered in the performance of a judicial function, and the relator's remedy was by appeal from that order and not by *mandamus.*

State ex rel. Pryor v. Anderson[78] was an original proceeding in *mandamus* in the St. Louis Court of Appeals[79] and reached the supreme court on certification due to a dissent by one of the judges of the court of appeals. A childless widower of unsound mind, for whom a guardian had been appointed, died in Missouri. On the day of his death the public administrator of the county of decedent's residence applied for and was granted letters of administration after a showing was made that deceased left no heirs residing in Missouri. Fifty-nine days after decedent's death, relatrix, a niece of deceased who had long resided in California, returned to Missouri for the purpose of establishing a legal residence in this state, that she might administer on decedent's estate. Having thereafter promptly applied for an order to revoke the appointment of the public administrator that she might in his stead be appointed administratrix, which application was denied, she applied for a writ of *mandamus* to compel the probate court to set aside the order appointing the administrator. Affirming the judgment of the court of appeals quashing the alternative writ, the supreme court held that under the provisions of the statute[80] the probate court properly appointed an administrator of the estate of deceased when proof was made that no persons having a preferential statutory right to administer[81] resided in this state, notwithstanding the fact that such

77. 343 Mo. 827, 123 S. W. (2d) 105 (1938).
78. 343 Mo. 895, 123 S. W. (2d) 181 (1938).
79. State *ex rel.* Pryor v. Anderson, 112 S. W. (2d) 857 (Mo. App. 1938).
80. Mo. Rev. Stat. (1929) § 9.
81. By virtue of Mo. Rev. Stat. (1929) § 7.

appointment was made prior to the expiration of thirty days after the death of the intestate and distributees did not file a renunciation of their preference.

State ex rel. Henry v. State Auditor[82] was an original action in *mandamus* against the state auditor, county judges, and liquidating officer of a special road district to compel the levy, certification and collection of taxes to pay past-due bonds of the district. A peremptory writ was awarded against the state auditor to compel him to make the levy in accordance with the statute,[83] the court holding that even though the demand for the levy was not made within the time fixed by law, that part of the statute fixing the time for the levy was only directory, and by other statutory provisions[84] assessments for taxes are not illegal on account of the fact that they are not made or completed within the time required by law.

State ex rel. Webster Groves Sanitary Sewer District v. Smith[85] was a proceeding in *mandamus* to compel the state auditor to register a bond issued by a subdistrict of a sanitary sewer district. The state auditor questioned the constitutionality of the statute under which the district was created.[86] The court held that since the bond was payable out of the revenue received from special assessments levied on the benefited property it was not a debt within the meaning of the provision of the constitution limiting the amount of indebtedness created to five percent of the value of the taxable property in the district; that the fact that the statute limited the right to vote in the subdistrict bond elections to resident owners of realty did not deny to nonresident owners equal protection of the laws or due process;[87] and that the fact that no hearing is allowed at the time of the creation of subdistricts does not violate the due process clause of the constitution, for the property owners had their opportunity to be heard on the organization of the whole district.

IV. Prohibition

Of the six cases the supreme court decided in 1938 involving the extraordinary writ of prohibition all originated in the supreme court and in

82. 342 Mo. 797, 118 S. W. (2d) 19 (1938).
83. Mo. Rev. Stat. (1929) § 8182.
84. Mo. Rev. Stat. (1929) § 9791.
85. 342 Mo. 365, 115 S. W. (2d) 816 (1938).
86. Mo. Laws, 1933-1934, Ex. Sess., pp. 119-136.
87. Their position being analogous to nonresident owners of property abutting on a street to be improved, who are denied by statute the right to protest against the improvement. Miners' Bank v. Clark, 252 Mo. 20, 158 S. W. 597 (1913).

each case the writ was directed against a circuit judge. Two of the cases were determined by division one of the court,[88] and the remainder by the court *en banc.*[89] In one of these cases the relator was an individual,[90] in another a municipal corporation,[91] in another the state superintendent of insurance,[92] and in the others private corporations.[93] In two of the cases the preliminary writ was dissolved[94] and in the other four cases the provisional rule was made absolute.[95]

State ex rel. Hannigan v. Kirkwood[96] held that where a circuit court appointed a receiver for a partnership of lawyers on application of one of the partners without notice to the other partner, who was then a nonresident of Missouri, and where it appeared that irreparable injury would probably ensue unless the court took some action, the appointment of a receiver was proper.

Where the supreme court entered a judgment directing the return of impounded funds held by a custodian appointed by a circuit court to the insurance superintendent for distribution to policy holders, on the ground that the circuit court had no jurisdiction of the subject matter, and thereafter the circuit court entered judgment on the mandate of the supreme court undertaking to retain jurisdiction to direct the distribution of such funds by the insurance superintendent, prohibition was used, in *State ex rel. Robertson v. Sevier,*[97] to stop the action of the circuit court in

88. State *ex rel.* Hannigan v. Kirkwood, 342 Mo. 242, 114 S. W. (2d) 1026 (1938); State *ex rel.* North St. Louis Trust Co. v. Wolfe, 343 Mo. 580, 122 S. W. (2d) 909 (1938).

89. State *ex rel.* Robertson v. Sevier, 342 Mo. 346, 115 S. W. (2d) 810 (1938); State *ex rel.* Phoenix Mut. Life Ins. Co. v. Harris, 343 Mo. 252, 121 S. W. (2d) 141 (1938); State *ex rel.* Carwood Realty Co. v. Dinwiddie, 343 Mo. 592, 122 S. W. (2d) 912 (1938); State *ex rel.* City of St. Louis v. O'Malley, 343 Mo. 658, 122 S. W. (2d) 940 (1938).

90. State *ex rel.* Hannigan v. Kirkwood, 342 Mo. 242, 114 S. W. (2d) 1026 (1938).

91. State *ex rel.* City of St. Louis v. O'Malley, 343 Mo. 658, 122 S. W. (2d) 940 (1938).

92. State *ex rel.* Robertson v. Sevier, 342 Mo. 346, 115 S. W. (2d) 810 (1938).

93. State *ex rel.* Phoenix Mut. Life Ins. Co. v. Harris, 343 Mo. 252, 121 S. W. (2d) 141 (1938); State *ex rel.* North St. Louis Trust Co. v. Wolfe, 343 Mo. 580, 122 S. W. (2d) 909 (1938); State *ex rel.* Carwood Realty Co. v. Dinwiddie, 343 Mo. 592, 122 S. W. (2d) 912 (1938).

94. State *ex rel.* Hannigan v. Kirkwood, 342 Mo. 242, 114 S. W. (2d) 1026 (1938); State *ex rel.* Phoenix Mut. Life Ins. Co. v. Harris, 343 Mo. 252, 121 S. W. (2d) 141 (1938).

95. State *ex rel.* Robertson v. Sevier, 342 Mo. 346, 115 S. W. (2d) 810 (1938); State *ex rel.* North St. Louis Trust Co. v. Wolfe, 343 Mo. 580, 122 S. W. (2d) 909 (1938); State *ex rel.* Carwood Realty Co. v. Dinwiddie, 343 Mo. 592, 122 S. W. (2d) 912 (1938); State *ex rel.* City of St. Louis v. O'Malley, 343 Mo. 658, 122 S. W. (2d) 940 (1938).

96. 342 Mo. 242, 114 S. W. (2d) 1026 (1938).

refusing to obey the mandate of the supreme court and in attempting to exercise jurisdiction it was held not to possess.

State ex rel. Phoenix Mut. Life Ins. Co. v. Harris,[98] held that prohibition would not lie to stop a circuit court from proceeding in a case against a foreign insurance company which had been brought into court on a summons served on the superintendent of insurance, where it appeared that the suit was on policies existing and unsatisfied in Missouri, though the company had ceased to do business in the state. The opinion traces the history of legislation and the decisions on service of process on insurance companies doing business in Missouri, and holds that the statute authorizing service of process on state insurance superintendent in proceedings against foreign insurance companies licensed to do business in Missouri provides the sole method of obtaining service. The opinion is a valuable one.

In *State ex rel. North St. Louis Trust Co. v. Wolfe,*[99] prohibition was used to stop a circuit court from trying issues raised by interrogatories and answers in proceedings to discover assets of the estate of a decedent in probate court, since the probate court has the exclusive original jurisdiction to try such issues.

In *State ex rel. Carwood Realty Co. v. Dinwiddie,*[100] it was held that, in view of the decision by the supreme court that the circuit court of Cole county[101] was without jurisdiction to supervise the distribution of insurance funds to policy holders, prohibition would lie to prevent a circuit court in another county from proceeding in a case where supervision by such circuit court is sought in the distribution of such funds.

In *State ex rel. City of St. Louis v. O'Malley,*[102] prohibition was used to stop a circuit court from proceeding in an action against the city by property owners for the assessment of damages to their property occasioned by the lowering of a street grade, the court holding that the statutes authorizing such actions had been superseded by the provisions of the city charter of the City of St. Louis.

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97. 342 Mo. 346, 115 S. W. (2d) 810 (1938).
98. 343 Mo. 252, 121 S. W. (2d) 141 (1938).
99. 343 Mo. 580, 122 S. W. (2d) 909 (1938).
100. 343 Mo. 592, 122 S. W. (2d) 912 (1938).
101. State *ex rel.* Robertson v. Sevier, 342 Mo. 346, 115 S. W. (2d) 810 (1938). See ante, this article, n. 97.
102. 343 Mo. 658, 122 S. W. (2d) 940 (1938).

V. Quo Warranto

State ex inf. McKittrick v. Wymore[103] was an original *quo warranto* proceeding by the state on the relation of the attorney general against a prosecuting attorney to determine the question of his title to the office of prosecuting attorney. Although the consideration of the case involved only a motion to quash the information, the opinion in the case restates a large part of the law concerning the extraordinary writ of *quo warranto* as it pertains to the right to determine title to public office. The court held that it had jurisdiction to determine the title of the respondent to his office, overruled the respondent's motion to quash the information, and granted him time within which to plea.

State ex inf. McKittrick v. Bode[104] was an original proceeding in *quo warranto* on the information of the attorney general of Missouri to oust the director of conservation appointed to a position created by constitutional amendment.[105] Relator contended that the respondent was a public officer and not a mere employee, and that he should be ousted because he had not resided in this state one year next preceding his appointment.[106] The court held that the constitutional amendment giving the conservation commission power to determine the qualifications of the director is in direct conflict with and a limitation on the constitutional provision that no person shall be elected or appointed to any office who shall not have resided in this state one year next preceding his election or appointment, to the extent of authorizing the commission to determine the necessary qualifications of the director, and the court could not oust the director even though he had not resided in the state one year next preceding his appointment.

THE HUMANITARIAN DOCTRINE

William H. Becker, Jr.*

In 1938, the supreme court *en banc* reversed itself upon one of the two important rulings of the much discussed case of *Perkins v. Terminal Rail-*

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103. 343 Mo. 98, 119 S. W. (2d) 941 (1938).
104. 342 Mo. 162, 113 S. W. (2d) 805 (1938).
105. Mo Laws 1937, p. 614.
106. Mo. Const. art. VIII, § 10.

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road Ass'n.[1] This action occurred in the case of *Buehler v. Festus Mercantile Co.,*[2] the only significant decision of the court *en banc* involving the humanitarian doctrine. It was not entirely unexpected.[3] During the same year, division one followed the other important aspect of the *Perkins* case.[4]

That secret nightmare of courts engaged in interpreting the Missouri humanitarian doctrine, the determination of the rights of two oblivious claimants colliding at an intersection, appeared in division two but was temporarily dispelled by limiting the ruling to a narrow decision upon an instruction.[5] Division one contributed two clearly stated formulae, one defining the zone of peril in cases of vehicular collisions where neither operator is oblivious, the other eliminating the humanitarian rule in ordinary cases where the plaintiff or his vehicle strikes the defendant's vehicle in the side.[6]

The cases involving the humanitarian doctrine generally were concerned with matters of practice. Nevertheless, at the close of the decisions for 1938 there persisted an undertone of unrest which presages at least a clearer statement of the nature of the humanitarian rule which may widen or narrow its functional aspects.

It is apparent that the widely accepted last clear chance rule must be distinguished from the humanitarian doctrine by the court before any true analysis of the humanitarian doctrine is attempted. Throughout 1938 the court continued to use the expression "humanitarian rule" as comprehending the ordinary last clear chance rule and something more.

I. The Court En Banc

The only decision of the court *en banc,* involving the humanitarian rule, resulted in condemnation of an instruction predicating liability upon the failure of the defendant to act after having knowledge that the defendant was "*approaching* and in a position of imminent peril."[7] The opinion was approved by Judges Ellison, Douglas, Gantt and Leedy. Therefore, the attitude of the new member of the court, Judge Clark, should not cause a re-examination of this ruling.

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1. 340 Mo. 868, 102 S. W. (2d) 915 (1937).
2. 343 Mo. 139, 119 S. W. (2d) 961 (1938).
3. See Becker, *The Work of the Missouri Supreme Court for the Year 1937 (The Humanitarian Doctrine)* (1938) 3 Mo. L. Rev. 392.
4. Barnes v. Terminal R. R. Ass'n., 343 Mo. 589, 122 S. W. (2d) 907 (1938).
5. State *ex rel.* Grisham v. Allen, 124 S. W. (2d) 1080 (Mo. 1939).
6. Lotta v. Kansas City Pub. Serv. Co., 342 Mo. 743, 117 S. W. (2d) 296 (1938).
7. Buehler v. Festus Merc. Co., 343 Mo. 139, 119 S. W. (2d) 961 (1938).

II. Division One

In *Barnes v. Terminal Railroad Ass'n.*,[8] division one followed the ruling in the *Perkins* case, holding that in a humanitarian case in which the peril of the plaintiff is caused by obliviousness, it is not necessary to require a finding of obliviousness in the instructions, because such a finding is comprehended in the ordinary requirement that "imminent peril" be found. So it appears that this aspect of the *Perkins* case is settled for some time at least.

Lotta v. Kansas City Public Service Co.,[9] is notable for its clear statement that, in the absence of obliviousness, the danger zone or position of imminent peril of a person approaching the path of a moving vehicle reaches no farther beyond the direct path of the moving vehicle than the distance within which the approaching person is unable by his own efforts to stop short of it. The case is also interesting because of its sweeping assertion: "Usually a humanitarian negligence case must fail when the plaintiff or his vehicle comes to an intersection last and runs into the side of the other vehicle."[10] This last statement was the basis for the reversal outright of a judgment for personal injuries.

Massman v. Kansas City Public Service Co.[11] involved a complicated situation where a pedestrian was struck either by a street car or automobile converging upon her. By applying familar principles, the court found that there was a submissible case of humanitarian negligence against the street car operator. In disposing of error assigned for the giving of instructions, the court made the interesting, if not novel, ruling that the failure to request an appropriate instruction upon a submissible ground of negligence is such an abandonment of that ground of negligence that the adverse party may ignore it in the framing of his instructions.

In *Lynch v. Baldwin*,[12] it was held error to instruct that the defendant had a right to assume that the plaintiff would exercise the highest degree of care and stop at a railroad crossing until it became apparent from the circumstances that the plaintiff would not stop. Such an instruction was held to inject contributory negligence in the case. The soundness of this ruling is questionable. There is much which can be said in answer to it.

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8. 343 Mo. 589, 122 S. W. (2d) 907 (1938).
9. 342 Mo. 743, 117 S. W. (2d) 296 (1938).
10. *Id.* at 302.
11. 119 S. W. (2d) 833 (Mo. 1938).
12. 117 S. W. (2d) 273 (Mo. 1938).

Burow v. Red Line Service, Inc.,[13] *Kick v. Franklin*,[14] and *Gorman v. Franklin*[15] involve no remarkable holdings.

III. Division Two

In *State ex rel. Grisham v. Allen*,[16] division two was confronted with a case which might well have caused a re-examination of the humanitarian doctrine and an exposition of its true nature. The case involved a collision of two automobiles which were meeting upon the highway. The plaintiff counted upon both primary and humanitarian negligence. The defendant answered with a general denial, a plea of contributory negligence, and a counterclaim based upon primary negligence and humanitarian negligence. The plaintiff made a humanitarian case against the defendant. The defendant submitted his defense, as well as his counterclaim, in a single instruction apparently based upon primary negligence, attempting to meet the plaintiff's humanitarian case by requiring a finding that the defendant was "at the time in the exercise of the highest degree of care upon his part." Defendant secured a substantial verdict and judgment.

The court limited its ruling to a finding that the defendant's principal instruction was erroneously drawn. The opportunity to settle the riotous confusion of practice and principle which occurs in such a situation was lost. Some day the court will have to determine and declare in a case involving an automobile collision (1) whether each operator can recover against the other simultaneously upon the humanitarian rule; (2) whether the humanitarian rule is a doctrine of proximate cause, comparative negligence, or liability without fault; and (3) what instructions may be properly given on behalf of each party in such a situation. Until these questions are answered the humanitarian doctrine must remain a mystery.

It is hard to reconcile the decision in the case of *Hangge v. Umbright*,[17] involving a collision of two automobiles at an intersection, with the ruling in *State ex rel. Grisham v. Allen*. The petition was based upon the humanitarian rule and plaintiff's case submitted thereunder. The defendant filed a counterclaim based upon primary negligence and submitted his counterclaim thereunder. In the defendant's instruction, submitting a counter-

13. 343 Mo. 605, 122 S. W. (2d) 919 (1938).
14. 343 Mo. 715, 117 S. W. (2d) 284 (1938).
15. 117 S. W. (2d) 289 (Mo. 1938).
16. 124 S. W. (2d) 1080 (Mo. 1939).
17. 119 S. W. (2d) 382 (Mo. 1938).

claim, there was no reference to the plaintiff's humanitarian case but only a requirement that the jury find "that the defendant at all times was exercising the highest degree of care and that the damage to defendant's car was the direct result of plaintiff's negligence." This instruction was upheld, in sharp contrast to the ruling in *State ex rel. Grisham v. Allen.* In this case it was also held that an abstract instruction properly stating the law regarding the right of way at intersections should not be given in a case submitted under the humanitarian rule.

The remaining cases decided by division two in 1938 involve routine application of accepted principles to various fact situations and various instructions. In *State ex rel. Baldwin v. Shain,*[18] it was held that a humanitarian case for failure to slacken a vehicle cannot be made on behalf of a pedestrian where slackening would afford no more than a bare possibility that the injury would be avoided. *State ex rel. Kansas City Public Service Co. v. Shain*[19] is notable for its observation that the ". . . humanitarian doctrine may be something more than an exception to the law of contributory negligence . . ."[20] In *Clarke v. Jackson,*[21] it was held that a humanitarian case was made by the operator of one of two automobiles colliding at night on the highway while traveling toward each other. Each claimed to be on his right hand side of the road, and each insisted that there was no sudden turning. The court held under these circumstances that the plaintiff made a humanitarian case. *Radabaugh v. Williford,*[22] and *Gardner v. Turk*[23] involve no new or particularly interesting pronouncements.

INSURANCE

ORRIN B. EVANS*

I. JURISDICTION

Section 5894 of the Missouri Revised Statutes 1929, as in force until May 29, 1939, required that as a condition of doing business within the

18. 125 S. W. (2d) 41 (Mo. 1938).
19. 343 Mo. 1066, 124 S. W. (2d) 1097 (1939).
20. *Id.* at 1099.
21. 342 Mo. 537, 116 S. W. (2d) 122 (1938).
22. 342 Mo. 528, 116 S. W. (2d) 118 (1938).
23. 343 Mo. 899, 123 S. W. (2d) 158 (1938).

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state, foreign insurance corporations should file an irrevocable power of attorney with the superintendent of insurance, authorizing him to receive service of process on behalf of such company, "in any court of this state . . . or of the United States in this state." It further provided that "service of process . . . as aforesaid, upon the superintendent shall be valid and binding . . . upon such company, so long as it shall have any policies or liabilities outstanding in this state, although such company may have withdrawn, been excluded from or ceased to do business in this state."

In 1916 the Missouri Supreme Court interpreted this statute to give jurisdiction over a foreign insurance company doing business in Missouri in a suit by a non-resident of Missouri upon an insurance contract made in a foreign state, the defendant company having been brought in only by service upon the insurance commissioner.[1] In other words, the court gave literal effect to the first quoted provision of the statute.

In 1927 the court squarely reversed itself, holding that such service did not give the Missouri courts jurisdiction over the non-resident company on those facts.[2] Investigating the history and antecedents of the statute, the court found that the second clause was not an independent provision concerned only with the retention of jurisdiction over companies no longer legally doing business within the state, and declared that it was to be read with, and as modifying, the first. That is, it held that not only must there be "policies or liabilities outstanding in this state," but the suit must be upon one of those contracts or liabilities. As to when a contract could be said to be "outstanding in this state," the court implied that a policy either issued and "outstanding" in Missouri or payable to a Missouri citizen, though issued elsewhere, fell within the statute.

In 1938 the court *en banc* considered a suit brought by a non-resident assignee of a resident beneficiary, upon a contract of insurance issued in Missouri upon the life of a Missouri citizen, against an non-resident company doing business here.[3] Service was had only upon the insurance commissioner. Jurisdiction was maintained upon the ground that the policy

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1. The Gold Issue Mining & Milling Co. v. Pennsylvania Fire Ins. Co., 267 Mo. 524, 184 S. W. 999 (1916). Such exercise of jurisdiction was held not to violate the provisions of the United States Constitution. Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U. S. 93 (1917).

2. State *ex rel.* American Central Life Ins. Co. v. Landwehr, 318 Mo. 181, 300 S. W. 294 (1927).

3. State *ex rel.* Phoenix Mut. Life Ins. Co. v. Harris, 343 Mo. 252, 121 S. W. (2d) 141 (1938). The assignment was made to prevent removal to the federal court upon the ground of diverse citizenship.

sued upon by the foreign plaintiff was "outstanding" in this state, because (a) the policy issued here (b) upon the life of a Missouri citizen.

It is evident that in the *Landwehr* case[4] the court considered that the policy or liability had its *situs* with the owner of the claim, a not unfamiliar doctrine of conflict of laws. By this view, a policy or liability would be outstanding in Missouri if, and only if, its owner were resident here. In the instant case that rationalization, if not the holding, was explicitly rejected. The two essential requirements are for the policy to have been written here upon a life or property here, it being the purpose of the statute to regulate business done in Missouri.

That the court was not satisfied with the social consequences of its decision is clear from its plea to the legislature for revision of the statute. The suggestion fell on fertile soil. By Mo. Laws 1939, p. 451 (which is a repeal, revision and re-enactment of Section 5894, Missouri Revised Statutes 1929) it is declared that service upon the superintendent of insurance is proper in all actions "by residents of this state upon any policy issued or matured, or upon any liability accrued in this State, or on any policy issued in any other state in which such resident is named beneficiary, and in all actions brought by non-residents of this State upon any policy issued in this State in which such non-resident is named beneficiary or which has been assigned to such non-resident and in all actions brought by non-residents of this State on a cause of action, other than an action on a policy of insurance, which arises out of business transacted, acts done, or contracts made in this State."

The statute broadens the law, but who will say it settles it beyond controversy?

II. Construction of Policies

In an action upon an employer's liability policy, the court employed the familiar principle that the construction of their own language by the parties to a contract should control in its interpretation to find that the occupational disease of silicosis was a "bodily injury, accidentally sustained."[5] Plaintiff introduced in evidence a letter to the employer from an

4. State *ex rel.* American Central Life Ins. Co. v. Landwehr, 318 Mo. 181, 300 S. W. 294 (1927).

5. Tomnitz v. Employers' Liability Assur. Corp., 343 Mo. 321, 121 S. W. (2d) 745 (1938). Judgment for plaintiff was reversed for lack of substantial evidence that plaintiff incurred the disease, which was shown to be a matter of the cumulative effect of repeated inhalation over a considerable period of time—which period varied greatly among individuals—during the duration of the policy. The court did not lay down any rule by which the time of inception of the disease may be determined.

inspector of the defendant company, suggesting various ways of reducing "accidents" among the employees and including, among its recommendations, the use of respirators for certain types of work. The court evidently did not wish to hold that silicosis and other occupational diseases were necessarily to be considered "bodily injuries, accidentally sustained," for *Soukup v. Employer's Liability Assur. Corp.*,[6] which had been thought[7] to lay down that rule, was said to rest upon the ambiguity of the particular policy.

Where death occurs as the result of bullet wounds received in flight after the commission of, or an attempt at, burglary, it is not "accidental" so as to permit double recovery as provided for death by "external, violent and accidental means."[8] The opinion of the court of the appeals to the contrary was quashed as in conflict with *State v. Adams*,[9] a criminal case in which it was held that homicide *committed* while attempting to escape was murder in the first degree. The mortal injury was received in the one instance and inflicted in the other within the *res gestae* of the principal offense, and was an emanation therefrom.

In *Swanson v. Central Surety & Ins. Corp.*,[10] the policy read, ". . . to indemnify the assured for all loss by burglary . . . occasioned by any person or persons making felonious entry . . . by actual force or violence when such premises are not open for business, *of which force and violence there shall be visible marks made upon such premises at the place of such entry by tools, explosives, electricity, or chemicals . . .*" The italicized portion was held a valid limitation on the liability of the insurer, not a void attempt to limit the character of the evidence by which the forcible entry might be proved.

In *State ex rel. Brotherhood, etc. v. Shain*,[11] the by-laws of relator fraternal benefit society provided that where any member felt himself aggrieved by any action taken by any constituted authority of the lodge, he might appeal to the president and then to the board of directors. Only after such unsuccessful appeals and after giving 30 days' notice of intention to sue at law, might he bring his action. An opinion of the court of appeals that such provisions were unreasonable and void, and were not a

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6. 341 Mo. 614, 108 S. W. (2d) 86 (1937).
7. See Note (1938) 112 A. L. R. 158.
8. State *ex rel.* Prudential Ins. Co. v. Shain, 342 Mo. 1049, 119 S. W. (2d) 309 (1938).
9. 339 Mo. 926, 98 S. W. (2d) 632 (1936).
10. 343 Mo. 350, 121 S. W. (2d) 783 (1938).
11. 343 Mo. 666, 123 S. W. (2d) 1 (1938).

defense to an action begun without satisfying them, was held not in conflict with holdings of the supreme court that a new contract may not be made for the parties. A distinction must be observed between conditions of liability and matters of procedure within the order before redress might be had in the courts.

In construing the contracts of a fraternal benefit association, said the court in *State ex rel. Security Benefit Ass'n v. Shain,*[12] the charter, constitution, and by-laws, as well as the certificate issued to the member must be considered. "Contract" is not synonymous with "certificate" in Section 6005, Missouri Revised Statutes 1929, and the mere fact that the certificate which expressly declares itself subject to the charter, constitution, and by-laws of the society, does not contain provision for contribution by other members, does not make the contract an "old line" insurance contract, where that stipulation (necessary for classification as a fraternal benefit contract) appears in the by-laws.

III. Non-Forfeiture Provisions

Sections 5741-5744, Missouri Revised Statutes 1929, provide in substance that "after the payment of three or more full years' premiums on a policy, upon default in the payment of any subsequent premium, the policy will not be forfeited but the net reserve or cash value of the policy will be taken as a net single premium to continue the policy for its original amount as temporary or extended insurance, for such time as the net cash value of the policy will carry it . . ., unless the policy contains a provision for its unconditional commutation for nonforfeitable paid-up insurance . . ."[13] for life in such amount as the policy provides conformable to statute, or for unconditional surrender in cash of the reserve, or for surrender of the policy for other adequate consideration, or for exchange of the policy for another form of policy from the company within sixty days from default (always preserving to the insured the right to extended insurance if he so elects). These provisions cannot be waived or contracted away by the parties. A decision of the court of appeals validating an automatic premium loan provision of a policy, which would utilize the cash reserve in case of default to keep the policy alive by advancing the premiums therefore as long as the amount of reserve permits (but because of the higher

12. 342 Mo. 199, 114 S. W. (2d) 965 (1938).
13. Frank, J., in State *ex rel.* Adams v. Allen, 343 Mo. 1191, 1196, 125 S. W. (2d) 854 (1939).

cost of the level premiums, terminating the "coverage" at an earlier date if the policy is not carried on by the insured than would be the case if the statutory single premium extended insurance were employed), because the parties might contract as they pleased, conflicts with supreme court decisions. A decision that the provision was valid within Section 5744 would not conflict, the supreme court never having passed on that issue.[14] A similar policy was upheld under a somewhat similar statute by the Michigan Supreme Court.[15]

The statutes are strictly construed. If a policy, as is common, offers several options to the insured who has defaulted after paying three years' full premiums, and further provides that upon default, "*if the insured has selected no other option,* the company, without any action upon the part of the insured, will continue this policy as a paid-up non-participating whole life policy for the amount stated in the table," it has not provided for that "unconditional commutation" within Section 5744 which may replace the extended insurance required under Section 5741.[16] A distinction was attempted between this provision and that in the policy before the court in *State ex rel. Clark v. Becker,*[17] which stated that upon default, "without action upon the part of the holder, the policy will be continued for its full value in participating paid-up life insurance . . ., or, if the holder so elect," he might avail himself of either of two other options. It was felt that in the instant case, the failure to elect another option, with the consequent uncertainty of the time of effectiveness, was a condition precedent to the operation of the "auto-matic" clause, whereas in the *Becker* case the contract gave the holder the right to change the option after the "automatic" provision had taken effect.

Conceding that the distinction is theoretically sound, to draw the line upon such slight variation in language makes hazardous the prediction of whether any policy not actually passed upon by the court satisfies the requirements of the statute.

The volume of insurance business renders commonplace a fact situation which might otherwise appear unlikely to recur. Death not infrequently overtakes the defaulting policy holder near the end of the period of extended insurance brought by his cash reserve. In those cases it may be highly

14. State *ex rel.* Heuring v. Allen, 342 Mo. 81, 112 S. W. (2d) 843 (1938).
15. 151 Mich. 610, 115 N. W. 707 (1908).
16. State *ex rel.* Adams v. Allen, 343 Mo. 1191, 125 S. W. (2d) 854 (1939).
17. 335 Mo. 785, 73 S. W. (2d) 769 (1934).

important to ascertain the precise day of default. Some time ago, our supreme court held[18] that where the policy was delivered and the first premium paid subsequent to the date specified in the policy as the recurrent premium date—the policy further specifying that it is not to take effect until delivery and payment of premiums—the date of delivery and payment should control rather than the date of the policy. In *Tabler v. General Am. Life Ins. Co.*,[19] however, the peculiar facts caused the court to date the default from the premium date in the policy, despite delay in delivery and payment. Controlling was the factor that in the interim the insured had come of an age more near to his next birthday than his past, on which the premiums had been assessed. While it is unfair to charge a year's premium for less than a year's insurance, the actuating principle of the *Halsey* case,[20] it is equally unfair to take protection at the lower premium calculated as of age 27 years and insist upon a premium *date* as of age 28 years.

IV. Estoppel

A clear case of estoppel was presented in *State ex rel. Ben Hur Life Ass'n v. Shain*,[21] where relator had taken over the assets and liabilities of decedent's insurer, had through that insurer's agents collected a subsequent premium and then informed decedent that his company was dissolved and its assets wiped out, all without informing him in any way of the merger, in consequence of which he stopped premium payments. In a suit for the face amount of the insurance under statutory extended insurance bought with the cash reserve when the default occurred, the insurer was not allowed to set up the liens on that cash reserve imposed by the terms of the merger it had concealed, which liens would have caused the termination of the extended insurance before the insured's death.

V. Foreign Law

A rational argument can be made that among the several sister states of this country all questions of conflict of laws are resolved into questions of the interpretation of the "full faith and credit" provision of the United

18. Halsey v. American Central Life Ins. Co., 258 Mo. 659, 167 S. W. 951 (1914).
19. 342 Mo. 726, 117 S. W. (2d) 278 (1938).
20. Halsey v. American Central Life Ins. Co., 258 Mo. 659, 167 S. W. 951 (1914).
21. 342 Mo. 928, 119 S. W. (2d) 236 (1938).

States Constitution.[22] This broad position has never been adopted by federal or state courts, and for the most part "conflicts" law is considered part of the internal law of each state. So, the Missouri Supreme Court denies appellate jurisdiction of simple conflict of laws cases presented to it as raising a constitutional question. However, in a few situations the United States Supreme Court has held that the full faith and credit clause required the application of a particular foreign law.[23]

The distinguishing elements of these cases are far from obvious,[24] and state courts have confined their rulings in accord to cases upon all fours with the precedents.

Robertson v. Security Benefit Ass'n[25] was an action for the endowment benefit originally promised in plaintiff's certificate of membership in defendant fraternal benefit society. The certificate was issued to plaintiff in Missouri, where he lived, but defendant was organized under the laws of Kansas. The certificate provided that the by-laws of the association should be part of the contract, and by them the agreement was subjected to future changes therein and amendments thereto. Subsequent to the issuance of the certificate the by-laws were changed to eliminate the endowment feature. In addition, a subsequent Kansas statute purporting to regulate fraternal benefit associations affirmatively permitted death and disability benefits, but made no provision for old age (endowment) benefits. The Kansas Supreme Court then held that the endowment promise was *ultra vires,* in a case directly in point. Relying upon *Modern Woodmen of America v. Mixer,*[26] division one of the Missouri Supreme Court held that it had jurisdiction to hear the appeal, a constitutional question being involved, and that the Federal Constitution required that the Kansas decision be regarded as decisive of the issue.

In *Clark v. Security Benefit Ass'n,*[27] the court *en banc* reached the

22. For discussion of this proposition, see Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?* (1931) 15 MINN. L. REV. 161; Ross, *Full Faith and Credit in a Federal System* (1936) 20 MINN. L. REV. 140; Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926) 39 HARV. L. REV. 533.

23. See authorities cited in note 22, *supra.*

24. Compare Bradford Electric Light Co., Inc. v. Clapper, 286 U. S. 145 (1932) with Pacific Employers Ins. Co. v. Industrial Accident Com'n, 59 S. Ct. 629 (1939). And see Beale, *Social Justice and Business Costs* (1936) 49 HARV. L. Rev. 593.

25. 342 Mo. 284, 114 S. W. (2d) 1009 (1938).

26. 267 U. S. 544 (1925). The court also cited Supreme Council of the Royal Arcanum v. Green, 237 U. S. 531 (1914); Hartford Life Ins. Co. v. Barber, 245 U. S. 146 (1917).

27. 343 Mo. 263, 121 S. W. (2d) 148 (1938).

same conclusion. The association's failure to pay the endowment originally provided for did not keep alive a membership upon which assessments had not been paid, as the endowment feature was void by the law of Kansas, to which full faith and credit must be accorded.

VI. Trial Practice

Where the liability insurer assumes the defense of an action against the insured, it is proper for that fact to be brought to the attention of the jury, who should "know everything that affects the credibility of witnesses and the weight to be given their testimony, including their interest not only in the subject-matter, but in the parties who are to profit or lose by the verdict."[28] But mere employment or payment of counsel, who prepares his case and subpoenas his witnesses independently of insurer's assistance, will not color or affect the evidence or the merits, nor justify informing the jury of the insurer's interest in the controversy.[29]

In no event is plaintiff entitled to ask the jury to return a large verdict against the defendant because someone else will bear it. A plea that "this suit is for $50,000 and that is the sum of money this woman is entitled to recover, if she is entitled to recover a dime. Don't worry about who we will collect it from . . . Leave it to the lawyers to collect it for her" is incurably prejudicial, and it is not within the discretion of the trial judge to refuse a new trial because the plaintiff's attorney withdrew the remark and apologized. It, in effect, told the jury the defendant carried liability insurance of $50,000 and requested a verdict for that amount.[30]

Though the court did not separate the elements of the offense, it apparently emphasized the attempt to induce a larger verdict because the defendant would be exonerated from it, which, while patently improper, would not seem not incurable. The fatally prejudicial factor in the plea was the inevitable implication that it was *an insurance company* which would ultimately assume the loss. Indeed, the court recognizes that it is the hope, based upon sound experience, that mere knowledge that the burden was to be distributed through insurance would of itself move the jury to a more generous verdict that motivates the farcical maneuverings throughout much tort litigation to get that information to it. Whether the hope is

28. Snyder v. Wagner Electric Mfg. Co., 284 Mo. 285, 311, 223 S. W. 911, 918 (1920).
29. Buehler v. Festus Merc. Co., 343 Mo. 139, 119 S. W. (2d) 961 (1938).
30. *Ibid.*

silent or expressed, the improper communication of the fact should, by the logic of the instant case, be ground for mistrial.

PROPERTY

WILLARD L. ECKHARDT*

I. POSSESSORY AND FUTURE INTERESTS IN LAND

Goins v. Melton[1] is the most questionable decision in 1938 in the field of estates. Robert N. Melton executed an instrument, in form a warranty deed, purporting to convey certain real estate to his niece, Alice G. Melton. The instrument contained the following provision: ". . . the grantor herein shall retain possession and control of all profits therefrom for and during his natural life time, also retaining to himself the right to sell and deed said land, or any part thereof during his life time, at his death title to all, or whatever part thereof remains unsold, to pass to and vest in the grantee . . ." The grantor died intestate and one of his heirs brought a suit for partition. The grantee under the instrument claimed a fee simple absolute in the whole. It was held that the instrument conveyed no interest whatsoever to the grantee because it was not an *inter vivos* conveyance, but was an invalid testamentary instrument not in compliance with the requirements for a valid will.

The court acknowledges that Missouri statutes permit the creation of an estate of inheritance to commence in the future.[2] But "the deed must vest in the grantee a present interest *and* an irrevocable interest" to be *inter vivos* and not testamentary. "Manifestly, the power to sell, reserved by the grantor in the present deeds, was equivalent to a power to revoke." Therefore, the court concluded that the instrument was testamentary. As to any definite criteria for distinguishing testamentary and *inter vivos* instruments, the court confessed its "inability to lay down the desired uniform test." The court followed the brief of Alice G. Melton in analyzing the interests allegedly created, as a fee simple in the grantee, subject to a life estate in the grantor. It is submitted that a correct analysis is that

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1. 343 Mo. 413, 121 S. W. (2d) 821 (1938).

2. MO. REV. STAT. (1929) § 3112: ". . . hereafter an estate of freehold or of inheritance may be made to commence in future by deed, in like manner as by will."

grantor had a defeasible fee simple and a limited power of appointment, and that the grantee had a defeasible springing executory interest (springing use).

Section 3112 of the Missouri Revised Statutes 1929, permitting the creation by deed of an estate of inheritance to commence in the future, in like manner as by will, did not enlarge the powers of a grantor; it simply changed his technique. After the Statute of Wills[3] a testator was permitted by direct devise without resort to technical words to create springing and shifting executory interests, future interests which violated the common law rules restricting the creation of remainders. A devise by a testator "to B at age 21," is just as effective as a devise "to *T to the use of* B at age 21." On the other hand, a grantor in an *inter vivos* conveyance had to resort to technical words of use to create a future interest which violated one of the common law rules as to remainders. A grant "to B at age 21" was void; to be effective the grant had to be "to T *to the use of* B at age 21."[4] One purpose of Section 3112 of the Missouri Revised Statutes 1929, is to permit a grantor in Missouri to create a springing or shifting use without resorting to the use technique, i. e., to create these estates by direct grant, as always was permitted by direct devise in wills.

Much of the court's uncertainty in determining whether a conveyance by A to B at A's death is *inter vivos* or testamentary is the result of a failure to recognize an old friend, the springing use, in unfamiliar garb. The courts would have much less trouble in dealing with an *inter vivos* instrument by A conveying to B one day after A's death. In the principal case of *Goins v. Melton,* the court said, probably correctly, that a revocable conveyance to B at A's death is testamentary. But could the grantor in the principal case revoke? The court asseverated but did not analyze, in reaching the conclusion this grantor could revoke.

In a truly testamentary instrument, how extensive are the testator's powers of revocation over a devise? First, the testator can convey the land *inter vivos* for valuable consideration. Second, the testator can convey the land *inter vivos* as a gift. Third, the testator can devise the land to another devisee, revoking his former devise. What were the grantor's powers of revocation in the principal case? He had a power "to sell and deed" said land. This evidently meant he could not convey the land as a gift *inter vivos,* or as a gift testamentary. Thus, the grantor had very

3. 32 Hen. VIII, c. 1 (1540).
4. CHESHIRE, MODERN REAL PROPERTY (4th ed. 1937) 434.

limited powers of revocation, and the grantee had a much more durable interest in her defeasible executory interest than she would have had in a mere expectancy under a will. It is submitting that the court might well have reached a contrary decision if the case had been adequately analyzed.[5]

Three Missouri cases presented the problem of construction as to whether under particular amorphous imitations a devisee took a fee simple or merely a life estate. Professor Atkinson discusses these cases in his section on Wills and Administration.[6] Professor Atkinson also discusses *Bates v. Bates*,[7] a case involving the question of whether "survivors" who are given a remainder are to be determined as of the testator's death or as of the life tenant's death.

Eisenhardt v. Siegel[8] concerned a conveyance of John Eisenhardt by warranty deed for valuable consideration to Herman Eisenhardt, providing that if the grantor should survive the grantee the land should "revert to and become the absolute property" of the grantor. The court held "that the title to the land in question under the deed, reverted to John upon Herman's death" even though while insane the grantor murdered the grantee.[9] The court followed the plaintiff's brief in speaking of the grantor's future interest in terms of reversion. The grantor cannot have a reversion because he has conveyed to the grantee a fee simple, either determinable or defeasible, and, therefore, the grantor has either a possibility of reverter or a right of entry. The decision of the case could not be affected by the type of future interest in the grantor, but the report of the case would be more useful to the profession if our real property vocabulary were used with less vagueness and with more accuracy.

Ahmann v. Kemper[10] is concerned with tenancy by the entirety and with homestead. This case is discussed by Professor Atkinson[11] and has been noted recently in two law reviews.[12]

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5. Cf. the discussion by Professor Atkinson in the section on Wills, *infra*, n. 18.
6. Presbyterian Orphanage of Missouri v. Fitterling, 342 Mo. 299, 114 S. W. (2d) 1004 (1938), discussed in the section on Wills, *infra*, at note 8; Graham v. Stroh, 342 Mo. 686, 117 S. W. (2d) 258 (1938), discussed in the section on Wills, *infra*, at note 9; Weller v. Searcy, 343 Mo. 768, 123 S. W. (2d) 73 (1938), discussed in the section on Wills, *infra*, at note 10.
7. 343 Mo. 1013, 124 S. W. (2d) 1117 (1939); discussed in the section on Wills, *infra*, n. 11.
8. 343 Mo. 22, 119 S. W. (2d) 810 (1938).
9. See further discussion in the section on Wills, *infra*, n. 20.
10. 342 Mo. 944, 119 S. W. (2d) 256 (1938).
11. In the section on Wills, *infra*, at n. 19.
12. Notes (1939) 4 Mo. L. Rev. 73, (1938) 24 Wash. U. L. Q. 135.

Two Missouri cases examined the troublesome problem of the nature of property interests created by rights of way.

State ex rel. Highway Comm. v. Griffith[13] involved a conveyance by warranty deed of certain described premises "as and for a right of way for said railway." In 1932 the grantee ceased to use the land for a railroad right of way. The highway commission, successor to any interests of the grantor in the land, appealed from a condemnation award in favor of Achtenberg, successor to any interests of the grantee railroad. The court held that Achtenberg did not have a fee simple absolute, but that the railroad had acquired only an easement which terminated on cessation of user. "The great weight of authority is to the effect that a conveyance of land to a railroad company for right of way purposes only, irrespective of the consideration, passes only an easement, and that when such use ceases, the land reverts to the grantor or his heirs."[14]

There are at least five types of interests that could result from the grant of land for a railroad right of way. First, grantor has a fee simple absolute subject to an easement of way, *e. g.*, grantor grants a railroad right of way in Blackacre to railroad and its assigns. Second, railroad has a determinable fee simple, and grantor has a possibility of reverter, *e. g.*, grantor grants Blackacre to railroad and assigns so long as used for railroad right of way purposes and no longer. Third, railroad has a defeasible fee simple and grantor has a right of entry for condition broken, *e. g.*, grantor grants Blackacre to railroad on the express condition that the land shall be used for railroad right of way only and if not so used grantor and his heirs may enter and terminate the estate. Fourth, railroad has a fee simple absolute. The grantor has merely stated what prompted him to make the conveyance. Fifth, a railroad right of way is a new type of interest which does not fit into the conventional categories of interests in land, and grantor and grantee have different interests than any of those above. The type of interest created by a particular limitation is a matter of interpretation and construction.

In the principle case, the court held that the railroad did not get a fee simple absolute (4), but the court is not clear just what interest the railroad did get. It probably makes no difference in the result of this case whether the railroad got merely an easement (1) or whether it got a de-

13. 342 Mo. 229, 114 S. W. (2d) 976 (1938).
14. *Id.* at 236.

terminable fee simple (2). The court talked about the railroad having an *easement,* and then spoke of the land *reverting* to the grantor. Language in terms of reversion is wholly inappropriate if an easement is involved. Language in terms of easement is wholly inappropriate if a possibility of reverter is involved. If the court did not want to commit itself as to the type of interest created, where such statements would be *dicta,* the court ought clearly to have reserved the problem. If the court wanted to commit itself, as it apparently did here, it should have done so on careful examination of the problem.[15] Hermaphroditic concepts are not useful.

In *Houck v. Little River Drainage Dist.*,[16] plaintiff's land was condemned for a public road. Later the defendant, a drainage district, built a levee along and over the road, and plaintiff asked compensation for this additional burden on his land. Judgment for the defendant, the drainage district, was reversed. The builder of the road who condemned the land could not " 'obtain a fee simple title to the land over which said road should be constructed. The only right granted to it was to obtain an easement or right of way for its proposed road.' Thus it appears that there was a reversionary interest in the rockroad right of way." Just as in the previous easement case, the court talked of "easements" and "reversionary interests" when the two are not concomitants. The holding in this case is right, but such terminology may lead to error in future cases.

II. Mortgages

Lustenberger v. Sarkesian[17] is the culmination of the metamorphosis of a *dictum* in a case involving one set of facts into a holding in a case involving a different set of facts, by dint of repeated responsive reading, and with no examination of the issue on its merits. An occasional examination of the judicial process, so strikingly illustrated here, is of value not only to teachers of law and to students but also to practicing lawyers.

Lustenberger v. Sarkesian is the most important mortgage case of the year, because it is the first *holding* in Missouri that a trustee under a trust deed mortgage does not get legal title at the time the trust deed is executed. A mortgagor executed a trust deed mortgage naming one Gow trustee, to secure a note. The trust deed provided that "In case of breach, foreclos-

15. See 1 Simes, Future Interests (1936) § 184.
16. 343 Mo. 28, 119 S. W. (2d) 826 (1938).
17. 343 Mo. 51, 119 S. W. (2d) 921 (1938).

ure could only be had 'at the request of the legal holder of said note.' "[18] Without request of Lustenberger, plaintiff and holder of the note, trustee Gow held a foreclosure sale and executed a trustee's deed, reciting default and request of the legal holder of the note for foreclosure. The purchaser at the foreclosure sale conveyed to Sarkesian, defendant, by warranty deed. Plaintiff, the note holder, asked the court to adjudicate that he had a first lien. The supreme court affirmed the trial court's judgment for plaintiff, subjecting the land to a lien. The court reasoned that both parties had equal equities, and ". . . if the equities are equal, the established rule is that the one who has the first lien or claim in point of time will be protected."[19]

On motion for rehearing the defendant argued that the court had overlooked the fact that the trustee Gow had legal title, hence Sarkesian acquired legal title, and the court should have applied the rule that where equities are equal, the person with legal title prevails.[20] Thus it was necessary for the court to decide who had legal title. The court held that the trustee in a trust deed form of mortgage did not have legal title. "In the first place we might say that the legal title, as that term is generally understood, does not vest in the trustee immediately upon the execution of a deed of trust, 'because a mortgage is but a security for the payment of the debt or the discharge of the engagement for which it was originally given, and until the mortgagee enters for breach of condition, and in any respect until final foreclosure, the mortgagor continues the owner of the estate.' "[21]

Lustenberger v. Sarkesian quotes this statement verbatim from *Reynolds v. Stepanek*,[22] which quotes almost verbatim from *Kennett v. Plummer*.[23] In *Kennett v. Plummer* the statement was *dictum* and Kent is the only authority cited. The problem there was whether a mortgagor's lessee without actual possession could maintain trespass. The court supported its conclusion that he could with the passage quoted above, to the effect that the mortgagee got merely a security interest. Most important, *Kennett v.*

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18. *Id.* at 58.
19. *Id.* at 62.
20. *Id.* at 64: The court is not articulate as to this contention, merely stating: "It is stated in the motion that our opinion 'overlooks' the proposition that the deed of trust vested in the legal title to the real estate in the trustee and that the trustee's deed passed that title to the grantees therein, which title vested in the Sarkesians 'two and one half years later.' " *Id.* at 53: This contention, however, is made clear in point 6b in the abstract of the defendant's brief: "Between equal equities, the law will prevail."
21. *Id.* at 64.
22. 339 Mo. 804, 99 S. W. (2d) 65 (1936).
23. 28 Mo. 142, 145 (1859).

Plummer was dealing with a straight mortgage, a fact that was never noticed in subsequent applications.

This doctrine next appears in *Farmers Bank v. Bradley.*[24] The problem there was whether a mortgagee of real estate under a trust deed mortgage had a lien on an unsevered crop of corn superior to that of a subsequent chattel mortgage of the same crop. Judgment for the chattel mortgagee was reversed. The chattel mortgagee contended "that in this state a deed of trust is treated as a mere security for the payment of the debt and not as an outright conveyance of title." The court replied that even if the mortgagor still had legal title, the trust deed was a superior lien until severance of the crop; thus it is apparent that a decision as to the place of legal title was not necessary in disposing of the case. The court then quoted the scripture from *Kennett v. Plummer,* without noticing that the earlier case had dealt with a straight mortgage and not with a trust deed mortgage.

Further lip-service was given in *Reynolds v. Stepanek* to the doctrine that the mortgagor under a trust deed mortgage retains legal title. That case involved the question of priority among successive deeds of trust. The defendant claimed that the trustee under a second deed of trust had legal title. The court said that in a deed of trust the debtor remains the owner, citing *Kennett v. Plummer* (which dealt with a straight mortgage) and *Farmers Bank v. Bradley* (which dealt with a deed of trust and spoke by way of *dictum.*) But even in this case the court's statement was *dictum* because there was an outstanding first deed of trust, and legal title would be either in the debtor or in the trustee under the first deed of trust. Title could not possibly be in the trustee under the second deed of trust. In *dictum,* again the court applies a straight mortgage doctrine to a trust deed type of mortgage without any examination of the issues involved.

So in *Lustenberger v. Sarkesian,* where for the first time in Missouri the correct determination of a case involving a trust deed form of mortgage depended on the place of legal title, the court gave no deliberate consideration to the problem, but relied solely on *dicta* from two earlier cases where there had been no examination of the problem.[25] The holding

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24. 315 Mo. 811, 815, 288 S. W. 774 (1926).

25. The initiated have perceived for a number of years the emptiness of such a respectable concept as "legal title." The most naive persons must be impressed with the futility of trying to decide cases by the touchstone of "legal title" when they meet complete frustration in working out mortgage problems on such a basis.

Thus, apparently Missouri has adopted the rule that the trustee in a trust deed mortgage does not get legal title. But, absent priority by recording, "there

of the case is in accord with the views of a majority of the courts which have considered the problem,[26] and seems desirable because it eliminates unnecessary differences between straight mortgages and trust deed mortgages. The case is interesting, however, for the process by which that holding was reached.

Robinson v. Field[27] involved a conveyance absolute on its face. The grantor proved by clear and convincing evidence that the conveyance in fact was intended as a mortgage to enable the grantee to make cost and appeal bonds and to secure the grantee's fees as attorney, and that the grantee had agreed to reconvey the land when pending litigation concerning the grantor was completed. The court held that the parol evidence rule does not prevent proof that a deed absolute on its face is in fact a mortgage. This is one of the most common types of equitable mortgages, and is the only mortgage today which closely approaches in theory the old common law mortgage where the mortgagee had a defeasible legal title and the mortgagor had a right of entry and in equity of redemption. It would seem that the lien theory of mortgages could not be applied in this situation to leave legal title in the mortgagor.

State ex rel. Breit v. Shain[28] was a suit to establish priority of a mortgage lien. The plaintiff had a first trust deed mortgage and the defendant a second trust deed mortgage expressly subject to the first mortgage. Then the mortgagor executed a new mortgage to the first mortgagee who released his original mortgage, knowing of the second mortgage but intending to retain a senior lien. On the record, the second mortgagee now had a senior encumbrance. The court held, with some slight support from earlier cases, that one who releases an old mortgage when he takes a new one does not lose his priority if he intends to maintain a senior lien. The junior encumbrancer had not changed his position, and the senior mortgagee was not guilty of laches, hence there was no estoppel. The case

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is no doubt whatever that a conveyance by the mortgagor to a purchaser for value without notice will not affect the right of the mortgagee. This establishes definitely that the mortgagee's interest in the land, whether it be called a 'lien,' 'security' or otherwise, is a legal and not an equitable interest. The necessary effect of the adopting at law of the equitable theory of the mortgage is the cutting down of the mortgagee's technical legal title to a right of security in the land, but what is left is a legal interest in no way subject to defeat by any conveyance of the property to an innocent purchaser for value." WALSH, MORTGAGES (1934) 31.

So goes the Cadmean game.

26. 1 JONES, MORTGAGES (8th ed. 1928) 66; 3 JONES, MORTGAGES (8th ed. 1928) 795.

27. 342 Mo. 778, 117 S. W. (2d) 308 (1938).

28. 342 Mo. 1148, 119 S. W. (2d) 758 (1938).

seems to be sound. We have here a continuity of lien. "The discharge of the earlier mortgage will not change the result provided the new mortgage was given to take its place as security for the same debt. Its lien is continued without break in the new mortgage."[29] However, a properly advised client in such a situation will renew the old mortgage rather than substitute a new mortgage; such procedure would have saved a suit here.

In *Straus v. Tribout*,[30] a purchaser of mortgaged chattels "subject to" a mortgage defended a foreclosure suit on the ground that the debt was tainted by usury because seven per cent bonds were alleged to have been sold at ninety. The court found it unnecessary to decide whether the loan was usurious, because even if it were, the defense of usury was not available to the defendant. He had purchased the land subject to the mortgage, the face value of the outstanding bonds being deducted from the agreed purchase price; hence, the grantee was not injured by any usury. In view of this decision, the defense of usury would rarely be available to a grantee of the mortgagor from whom usurious interest was being exacted unless the grantee paid the full unencumbered value of the property to the mortgagor, not knowing of the mortgage, or relying on the mortgagor to remove the encumbrance by paying the mortgagee.

In *Farm Mtg. Holding Co. v. Homan*,[31] a trust deed mortgage provided that if the named trustee failed to act because of disability, the legal holder of the note should have the power to substitute another trustee, ". . . and the party so substituted shall have the same powers as the trustee herein named, and the acts of said substituted trustee shall be as effectual and binding upon all parties as if performed by the trustee herein named." Pursuant to this power, the holder of the note appointed its employee as substitute trustee. The mortgagor claimed that a foreclosure sale by such substitute trustee was void, because the original trustee was under a disability, and the substitute trustee was to have "the same powers" and his acts were to be "as effectual and binding" as those of the original trustee. Therefore, the acts of the substitute trustee were as ineffectual as those of the original trustee would have been. The court rejected the argument, plausible though it was from a strictly verbal point of view. The court pointed out that Missouri Revised Statutes 1929, Sections 3135 and 3137, are open to the same objection.

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29. WALSH, MORTGAGES (1934) 181.
30. 342 Mo. 511, 116 S. W. (2d) 106 (1938).
31. 342 Mo. 969, 119 S. W. (2d) 272 (1938).

A more serious objection to the validity of the foreclosure sale was that the substitute trustee was an active employee of the mortgagee and the sale was to the mortgagee. Although the court censured the note holder for appointing its employee, the court refused to set aside the sale in the absence of any showing of inadequate price or clear and convincing proof that the trustee's conduct at the sale injured the debtor. It seems that such a sale is practically a sale by a trustee to himself, and is open to the same objections. "It has been held that the trustee in Missouri can neither directly nor indirectly become the purchaser at his own foreclosure sale, and such a sale has been held absolutely void."[32]

Pueblo Real Estate Loan & Inv. Co. v. Johnson[33] presented a similar problem. The mortgage was an ordinary mortgage with a power of sale in the mortgagee. The mortgagee sold to himself at foreclosure sale at an adequate price and under a fairly conducted sale. If the mortgagee was expressly authorized to sell to himself, a sale to himself would foreclose the mortgagor's equity of redemption. But if the mortgagee had no express power to sell to himself, a foreclosure sale to himself is voidable, even if the sale was fair and at an adequate price. The mortgagor's remedy is a bill to redeem, with a tender of the amount owed. The whole problem of the right of a mortgagee or trustee to sell to himself is exhaustively considered in the light of Missouri authority in a recent comment in the Missouri Law Review.[34]

III. Appellate Jurisdiction

There is real need for a definitive statement as to the appellate jurisdiction of the supreme court.

The supreme court has appellate jurisdiction "where the amount in dispute" exceeds $7500.[35] But in *Rust Sash & Door Co. v. Gate City Bldg. Corp.*,[36] a proceeding to establish a mechanic's lien of $14,527.87, the court on its own motion raised the issue of jurisdiction and disclaimed jurisdiction because the defendant did not dispute the amount but only disputed whether the lien existed; therefore, there was "no amount in dispute" over $7500. No authority is cited for the startling proposition.

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32. Comment (1939) 4 Mo. L. Rev. 186, 189.
33. 342 Mo. 991, 119 S. W. (2d) 274 (1938).
34. Comment (1939) 4 Mo. L. Rev. 186.
35. Mo. Const. art. VI, § 12; Amendment of 1884, § 3; Mo. Rev. Stat. (1929) § 1914.
36. 342 Mo. 206, 114 S. W. (2d) 1023 (1938).

An ordinary action of ejectment is not a case "involving title to real estate,"[37] therefore, the supreme court has no jurisdiction on appeal.[38] Previous confused Missouri authority is discussed in this case, and the majority view in *Ballenger v. Windes*[39] is adopted. A proceeding to establish a mechanic's lien is not a case "involving title to real estate."[40] "Actions which adjudicate only as to liens on real estate and do not directly affect the title are not actions involving title to real estate within the meaning of that provision." Neither does a petition to cancel notes and deed of trust securing them, for failure of consideration, present a case "involving title to real estate."[41] Title is involved in the judgment only incidentally and collaterally.

But an action of ejectment with a count to quiet title is a "case involving title to real estate."[42] *Boone v. Oetting*[43] was an "action in ejectment to determine title." No one questioned the court's jurisdiction. *Quaere* whether the petition contained a count to quiet title, or whether in some other way this case differs from *Gibbany v. Walker.*[44] *Proffer v. Proffer*[45] held that a suit contesting a will which devised real estate involved title to real estate and the supreme court had appellate jurisdiction.[46]

PUBLIC UTILITIES

SMITH B. ATWOOD*

There were but few cases before the Supreme Court of Missouri during the year 1938 which involved questions of peculiar interest in the public utility field. Numerous cases were examined in which public utilities were

37. MO. CONST. art. VI, § 12.
38. Gibbany v. Walker, 342 Mo. 156, 113 S. W. (2d) 792 (1938).
39. 338 Mo. 1039, 93 S. W. (2d) 882 (1936), (1937) 22 WASH. U. L. Q. 265.
40. Rust Sash & Door Co. v. Gate City Bldg. Corp., 342 Mo. 206, 114 S. W. (2d) 1023 (1938).
41. Brutcher v. Fitzsimmons, 343 Mo. 547, 122 S. W. (2d) 881 (1938).
42. Curry v. Crull, 342 Mo. 553, 116 S. W. (2d) 125 (1938); see Gill, *The Work of the Missouri Supreme Court for the Year 1937* (*Property*) (1938) 3 MO. L. REV. 398, 402: "A denial is an admission."
43. 342 Mo. 269, 114 S. W. (2d) 981 (1938); see Gill, *The Work of the Missouri Supreme Court for the Year 1937* (*Property*) (1938) 3 MO. L. REV. 398, 402: "An owner can have both land and purchase price."
44. 342 Mo. 156, 113 S. W. (2d) 792 (1938); the same question might be posed as to Smith v. Wallace, 343 Mo. 1, 119 S. W. (2d) 813 (1938).
45. 342 Mo. 184, 114 S. W. (2d) 1035 (1938).
46. See the section on Wills, *infra*, n. 1.

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incidentally involved as parties defendant, in which the crux of the action pertained to other fields of litigation. Some of these cases were on the border line and it was difficult to determine if the issues decided were of general interest to the public utility industry.

I. Railroads

Construction and Maintenance

An instance of a border line case is *Jones v. Chicago, Burlington & Quincy R. R. Co.*,[1] which was an action to recover damages under Section 4765, Missouri Revised Statutes 1929. Under the provisions of this statute it is the duty of every company owning or operating a railroad in this state to cause to be constructed and maintained suitable openings across and through the right of way and roadbed of such railroad so as to afford sufficient outlet to drain off water, including surface water, along such railroad whenever the draining of such water has been obstructed by the construction thereof. It also gives the right to any adjoining landowner to construct such openings himself, at the expense of the railroad upon its failure to do so after notice, and subjects the railroad to damages for failure to comply with the statute. On the point of contention by the railroad that the right to maintain an action for damages from overflow resulting from failure of the railroad to comply with the statute was limited to an adjoining landowner, the court held that, while an adjoining landowner alone had the right to construct the opening at the expense of the railroad after its failure to do so, one not an adjoining landowner may maintain an action for damages under the statute, upholding a former decision to the same effect.

II. Rates

In *State ex rel. Public Service Commission v. Shain*,[2] a petition for a writ of *certiorari*, the court reaffirmed the proposition that rates established by the Public Service Commission are *prima facie* reasonable, and that the burden of showing their unreasonableness is upon the party seeking to set aside such rates. That such orders by the commission must be based on competent, substantial evidence was also reaffirmed. The appellate court had held that, in a proceeding before the Public Service Commission to fix

1. 343 Mo. 1104, 125 S. W. (2d) 5 (1939).
2. 342 Mo. 867, 119 S. W (2d) 220 (1938).

maximum rail rates for coal, such competent evidence was not to be found in the fact alone that truck rates for this commodity were lower than the then existing rail rates, and an order reducing rail rates upon such evidence was not justified. The supreme court refused to quash the opinion of the appellate court in the absence of a conflict with supreme court rulings upon the point.

Baldwin v. Scott County Milling Co.[3] was a suit to recover a sum paid by the Missouri Pacific Railroad Company pursuant to an order made by the Interstate Commerce Commission in a proceeding before that body wherein it found that excessive rates had been charged and collected in connection with coal shipments by defendant. The amount was paid on the demand of defendant in accordance with the commission's rules of practice. Thereafter, following numerous unsuccessful motions by the railroad, the commission reopened the case and set aside its order, including the reparation order under which the payment was made. Our supreme court held that the payment by the railroad company was voluntary and could not be recovered, inasmuch as it was made before the shipper had brought proceedings to enforce the commission award, in which proceeding the carrier would have had his day in court to review the order; that said order was not a "judgment," and that because of the events that had transpired since the payment, it would work an inequity and injustice upon the defendant to allow a recovery.

The case was reversed by the Supreme Court of the United States in *Baldwin et al. v. Scott County Milling Co.*,[4] where it was held that in view of the *prima facie* case against the railroad in any court in which the commission's order may be reviewed, the railroad was not compelled to risk the hazards and penalties that may have resulted from an adverse ruling, and in this situation the payment by the railroad was not voluntary and could be recovered. It was held, moreover, that equitable considerations may not serve to justify failure of the carrier to collect, or retention by the shipper of, any part of lawful tariff charges.

3. 343 Mo. 915, 122 S. W. (2d) 890 (1938).
4. 59 Sup. Ct. 943 (1939).

TAXATION

J. W. McAfee*

I. Taxation of Personal Property Transferred by Conditional Sales Contract

In *Municipal Acceptance Corp. v. Canole,*[1] Fairbanks, Morse & Co. made a conditional sale of machinery to the city of Fayette, and the city executed and delivered to the company, in payment, "pledge orders" to be paid monthly, but only out of that part of the net earnings from electricity generated by the use of the machinery which represented a saving over the average cost of production for a prior year. The sales contract provided that "title and ownership" remained in the company until final payment was made, that the city should operate its plant in an efficient and economical manner, and that the company might inspect the plant and could retake the machinery in event of default. The company assigned the pledge orders, together with its title to the machinery, to the plaintiff, which owned $60,000.00 of them, as of June 1, 1932. The state tax commission fixed the value of the machinery, and plaintiff appealed to the state board of equalization, which approved the assessment. Thereupon, plaintiff brought this suit to enjoin collection of the tax. The chancellor held that although the weight of authority is that where the vendor under a conditional sales contract reserves merely a security title, taxes are assessed against the vendee, nevertheless the degree of control retained by the vendor in this case indicated the reservation of more than a "security title," so as to make plaintiff liable for the taxes. Plaintiff appealed from a decree dismissing its bill. It was held that plaintiff did not have an adequate remedy at law; that evidence as to the ownership of the machinery did not appear on the face of the record of the state board of equalization and, consequently, could not be raised by *certiorari;* and that the point here raised could not be asserted as a defense against an action at law to collect the taxes because it would amount to a collateral attack upon the "judgment" of the board of equalization.[2] The court denied the contention of

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1. 342 Mo. 1170, 119 S. W. (2d) 820 (1938).

2. The conclusion of the court as to the remedy by injunction is consistent with established authority, a number of which are cited in the opinion.

respondent that it was necessary for plaintiff to tender into court the amount of taxes to be due if the judgment should be adverse. On the main question of whether plaintiff was the owner of the machinery in such sense as to make it liable for taxation,[3] the court held that the machinery belonged to the city, with a defeasible title in the vendor to secure the purchase price; that the arrangement resembled a chattel mortgage; and that the defeasible title reserved by the vendor after transfer of possession was not such ownership as made it liable for taxes.[4] The respondent also advanced the argument that since the "pledge orders" were not debts of the city,[5] the transaction was not a conditional sales contract. In overruling this contention the court said that an unconditional obligation to pay a definite sum in a specified time is not an essential element of a conditional sales contract.[6] The decree of the chancellor was reversed, with directions to grant a perpetual injunction.[7]

II. Taxation of the Sale of Electricity to Public Utilities

In *State ex rel. Kansas City Power & Light Co. v. Smith,*[8] in a *certiorari* proceeding the circuit court had quashed the record of the state auditor in levying an additional sales tax assessment on the power company for the sale of electric current to the Kansas City Public Service Company, to be used to propel its street cars, and to Kansas City and the cities of Glas-

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3. Mo. Rev. Stat. (1929) §§ 9746, 9756.

4. The weight of authority supports the rule that a purchaser in possession under a conditional sales contract is the one liable for taxes. State v. White Furn. Co., 206 Ala. 575, 90 So. 896 (1921); State v. White Furn. Co., 18 Ala. App. 249, 90 So. 895 (1921); Wells v. Mayor & Aldermen, 87 Ga. 397, 13 S. E. 442 (1891); Massey-Harris Co. v. Lerum, 60 S. D. 12, 242 N. W. 597, 598 (1932); State v. J. I. Case Co., 189 Minn. 180, 248 N. W. 726 (1933); Bowls v. Oklahoma City, 24 Okla. 579, 104 Pac. 902 (1909); Buttram v. Gray County, Texas, 62 F. (2d) 44 (C. C. A. 1932). In some jurisdictions governmental agencies may collect either from the conditional vendor or the vendee. Weber Showcase & Fix. Co. v. Kaufman, 45 Ariz. 397, 44 Pac. (2d) 158, 159 (1935) (under statute); Automatic Voting Machine Corp. v. Maricopa Co., 50 Ariz. 211, 70 Pac. (2d) 447, 449 (1937); Jordan v. Baggett, 37 Ga. App. 537, 140 S. E. 902 (1927). And there are cases holding that the taxes should be assessed against the vendor. Wanee v. Thomas, 75 Cal. App. 231, 242 Pac. 509 (1925); Remington Cash Register Co. v. State Board of Taxes & Assessments, 8 N. J. Misc. 875, 152 Atl. 330 (1930).

5. Bell v. City of Fayette, 325 Mo. 75, 28 S. W. (2d) 356 (1930), holding that the pledge orders here involved do not amount to debts so as to obligate the city beyond the limits set by the Mo. Const. art. 10, § 12.

6. In view of the holding in the Bell case, it is interesting to consider whether the pledge orders are such "credits" as might themselves be subject to taxation. Accounts receivable are, of course, generally taxable as personal property. State *ex rel.* Globe-Democrat Publishing Co. v. Gehner, 316 Mo. 694, 294 S. W. 1017 (1927).

7. Opinion by Ellison, J.; all concurring except Douglas, J., not sitting because not a member of the court when the case was submitted.

8. 342 Mo. 75, 111 S. W. (2d) 513 (1938).

gow and Sweet Springs, to be used to pump water for their municipal water works. The question was whether the transactions were "sales of . . . electrical current . . . to domestic, commercial or industrial consumers," as those terms are used in the Missouri Sales Tax Act.[9] The court, after conceding that the word "commerce" has been construed to include transportation of passengers in cases considering the interstate commerce clause of the Federal Constitution,[10] held that if the word "commercial," as used in the Sales Tax Act, is meant to include everything pertaining to commerce, then it would also include industrial pursuits, thus rendering the word "industrial," used in the section, meaningless. Since it is the duty of the court to give meaning, if possible, to all of the words in the statute, the court said:[11] "The ordinarily accepted use of the phrase 'commercial establishment' denotes a place where commodities are exchanged, bought, or sold, while the ordinarily accepted meaning of the phrase 'industrial establishment' denotes a place of business 'which employs much labor and capital and is a distinct branch of trade; as, the sugar industry'. Webster's New International Dictionary. Thus, we see that the transportation of passengers would not come within the ordinary meaning of either the word 'commercial' or 'industrial'."

In further support of its definition, the court pointed out that governmental agencies dealing directly with electric utilities classify sale thereof as domestic, commercial, industrial, sale of electricity to railroads, municipalities and to other utilities for resale.[12] It is concluded that by specifically enumerating classes of sales of electricity which were to be subject to the tax, other classifications were impliedly excluded; that the sales in question did not fall within the classes enumerated in the statute; and that the assessment was, consequently, without support in law. The judgment of the circuit court was affirmed.[13]

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9. Mo. Laws 1933-34, Ex. Sess., p. 155, 157.

10. U. S. CONST. Art. 1, § 18; Anderson v. Louisville & N. R. Co., 62 Fed. 46 (1894); Passenger Cases, 48 U. S. 283 (1848); Chicago & N. W. R. R. Co. v. Fuller, 17 Wall. 560 (U. S. 1873).

11. 342 Mo. 75, 111 S. W. (2d) 513, 515 (1938).

12. The court in this connection specifically refers to the Public Service Commission of Missouri, the Public Utility Commission of Kansas, the National Association of Railway and Utilities Commissioners, the National Electric Light Association and the Federal Power Commission. Classifications on this subject are to be found in General Order No. 5 of the Missouri Public Service Commission effective October 15, 1913.

13. Opinion by Tipton, J.; all concur.

III. State Income Tax on Salary of Employee of a Federal Corporation

State ex rel. Baumann v. Bowles[14] was a suit to collect state income for the year 1934 upon the salary of defendant as a joint employee of four corporations created by act of Congress, each being a unit of the Farm Credit Administration. The sole question was whether the tax was prohibited by the Federal Constitution. It was held that it did not appear that the tax would interfere with governmental activities of the corporations involved and that the judgment in favor of plaintiff should be affirmed. *People of New York ex rel. Rogers v. Graves*[15] was cited without discussion. The court's refusal to give controlling weight to this authority is supported by subsequent events. The Supreme Court of the United States, in *Graves v. People of State of New York*,[16] in holding that the salary of an employee of the Home Owners' Loan Corporation may be subjected to state income tax, expressly overrules the *Rogers* case[17] and other cases restricting the right to tax salaries of federal employees.

IV. Priorities

Sanders v. Banks[18] was an action to determine title to certain land. Plaintiff's claim was based upon the purchase of the land at a sale for the enforcement of a judgment for drainage taxes, held on March 30, 1932. Plaintiff received a sheriff's deed dated March 31, 1932, and acknowledged April 1, 1932, but the same was not recorded until February 20, 1934. Defendant Owens claimed title by a purchase on November 24, 1933, at a sale

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14. 342 Mo. 357, 115 S. W. (2d) 805 (1938).
15. 299 U. S. 401 (1937).
16. 306 U. S. 466 (1939); see also State Tax Commission of Utah v. Van Cott, 306 U. S. 511 (1939), involving the right of the state to tax salaries of attorneys for the Reconstruction Finance Corporation and the original Agricultural Credit Corporation.
17. Mr. Justice Stone, in a majority opinion, points out that the theory that a tax on income is legally or economically a tax on its source is no longer tenable, and: "Assuming, as we do, that the Home Owners' Loan Corporation is clothed with the same immunity from state taxation as the government itself, we cannot say that the present tax on the income of its employees lays any unconstitutional burden upon it." (l. c. 601) Mr. Justice Frankfurter, concurring in a separate opinion, concludes that Chief Justice Marshall's *dictum* in McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819), that "the power to tax involves the power to destroy," was brushed away by Mr. Justice Holmes in his dissenting opinion in Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 223 (1928), where he said: "The power to tax is not the power to destroy while this Court sits." Mr. Justice Butler, with the concurrence of Mr. Justice McReynolds, dissented in a short opinion.
18. 342 Mo. 311, 114 S. W. (2d) 1021 (1938).

held pursuant to a judgment obtained in a suit instituted September 26, 1931, for the collection of state and county taxes. Defendant received a sheriff's deed dated November 24, 1932, acknowledged November 27, 1933, and recorded December 2, 1933. All admitted that the lien for state and county taxes was paramount to all other claims and liens, but plaintiff asserted that the statute[19] required that actions for state and county taxes should be "prosecuted" against the owner of the property and that since he became the owner before judgment in the tax suit he should have been made a party thereto. The court, in ruling against this contention, pointed out that plaintiff did not record his deed and that there was no evidence that the collector, as plaintiff in the suit to collect state and county taxes, had any knowledge of plaintiff's interest in the land. The court refused to pass upon the question of whether it would have been necessary to make the plaintiff a party if his interest had been known but it was pointed out that plaintiff could, on his own motion, have been made a party defendant. The action of the court in affirming judgment in favor of defendant Owens is consistent with analogous rulings.[20]

V. Miscellaneous

There were several cases decided during the period covered hereby which are digested under the heading "Taxation" but which were actually decided upon points which add little to the subject in general.

In *Ellis v. Powell*,[21] it was held that although as a general rule a sheriff's sale of real estate under execution will not be set aside on mere inadequacy of consideration, nevertheless, where the amount paid is so grossly inadequate as to amount in itself to conclusive evidence of fraud, relief may be granted not on the ground of inadequacy of consideration, but on the ground of fraud, as evidenced thereby. Here, in a sale on execution, based upon a judgment for taxes, of property worth between two and four hundred dollars, for $8.50, it was held that the judgment of the circuit court setting aside the sheriff's deed should be affirmed.

In *State v. Gilmore*,[22] it was held that the words "the limitation on the amount to be retained as herein provided shall apply to fees and commissions on current, back and delinquent taxes," as used in the statute

19. Mo. Rev. Stat. (1929) § 9953.
20. Millerson v. T. W. Doherty Land & Cattle Co., 241 S. W. 907 (Mo. 1922).
21. 117 S. W. (2d) 225 (Mo. 1938).
22. 342 Mo. 1232, 119 S. W. (2d) 805 (1938).

limiting the maximum amount of compensation which a collector may retain,[23] required the collector to include fees and commissions on delinquent taxes in computing the amount to be retained by him.[24] The court considered the fact that subsequently to the period involved herein the legislature repealed the section under consideration and adopted a new section "clarifying said law and pertaining to the same subject matter"[25] but said that the legislature did not have the power, by the use of the word "clarifying," to give the new law retroactive effect.[26]

TORTS

GLENN MCCLEARY*

While the field of Torts, in the period under review, was as active in the number of cases decided by the Missouri Supreme Court as in the previous periods which have been reviewed in this annual study of the work of the court, yet the decisions for 1938 do not show any outstanding development in any particular aspect of the subject, except in the application of the humanitarian doctrine. In general, the facts of the various cases do not seem to have raised many new questions. The decisions in which the humanitarian doctrine was presented are again given special treatment elsewhere in this study of the work of the court, so that the doctrine may be examined more critically.

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23. MO. REV. STAT. (1929) § 9935 (as amended, Mo. Laws 1933, p. 454).

24. As is pointed out in the opinion in State *ex rel.* Buchanan County v. Fulks, 296 Mo. 614, 247 S. W. 129 (1922), the court ruled that the words of the original section (Section 12927, REV. STAT. (1919))—". . . all fees and commissions coming into the hands of any collector from any source whatever . . ." used in connection with limitation upon the amount which a collector could retain, required him to include fees collected on delinquent taxes. It is to be noted that the language of the statute under consideration in the above case is even stronger than that passed upon in the Fulks case.

25. Mo. Laws 1937, p. 545; MO. STAT. ANN., § 9935, p. 7975.

26. MO. CONST. art. 2, § 15, art. 14, § 8: the court calls attention to the question of whether the collector can, under the 1937 act, retain fees collected on back taxes if doing so results in his total fees exceeding the constitutional limitation.

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I. Negligence

A. *Duties of persons in certain relations*

1. Possessors of Land

A possessor of land is liable for harm caused to business visitors (invitees) by a natural or artificial condition thereon if he knows, or by the exercise of reasonable care he could discover the condition which, if known to him, he should realize as involving a risk of injury to them and he has no reason to believe that they will discover the danger or realize the risk, if he does not make the condition reasonably safe or does not give an adequate warning. In determining the extent of preparation which a business visitor is entitled to expect from the possessor, the nature of the premises and the purposes for which they are used is of importance. His duty may vary depending whether the premises are a private residence, a store, or other similar place of business, or a factory. In *State ex rel. Trading Post Co. v. Shain*,[1] the evidence was that vegetables on display in a store where the customer fell were prepared at another place, where the unsalable leaves and stalks were left, and that vegetable debris on the floor, causing the customer to fall, was bruised and dark. The court held that this was not sufficient for the jury on the question whether the debris had been on the floor for such length of time as to constitute notice to the storekeeper, and that the decision of the Kansas City Court of Appeals in holding such evidence to be sufficient for the jury on this question was in conflict with controlling decisions of the supreme court. In *O'Malley v. City of St. Louis*,[2] the plaintiff tripped over an irregularity in an incompleted floor of the new auditorium while attending the dedication ceremonies. The depression in the center of the floor which was intended at some future time to receive a carpet, was about three-quarters of an inch lower than the border of the floor, and there was a wood strip to which the carpet was to be anchored extending about one-half inch above the border. Reasoning from analogies of other cases where the offset in streets was greater, the court ruled that the elevation of the wood strip one-half inch above the surface of the border, under the facts of this case, did not constitute actionable negligence. While there were no signs or guards to warn that

1. 342 Mo. 588, 116 S. W. (2d) 99 (1938).
2. 343 Mo. 14, 119 S. W. (2d) 785 (1938).

the floor at this point was not finished, the plaintiff saw or should have seen this when she reached the top of the stairway and before she stepped to pass over the border. But in *Philibert v. Benjamin Ansehl Co.*,[3] the business visitor was struck from above when cartons of empty jars fell from an overhead platform or shelf. The plaintiff, an employee of a telephone company, was on the defendant's premises to install a switchboard. He had gone to the rear part of the factory portion of the building to consult the defendant's carpenter about constructing a box to be used in connection with the installation of the switchboard. Whether the plaintiff exceeded the scope of his invitation by going to the factory room to see about the box, and thus had lost his status of a business visitor, was held to be a question for the jury.

The principle that no duty is owed to a trespasser to keep a lookout for him was applied in two cases. In *Angelo v. Baldwin*,[4] the injuries were sustained when the plaintiff was struck by a moving car while picking coal from the ground in the defendant's railroad yard. The plaintiff attempted to bring his status within the exception to the trespass rule where numerous persons have been habitually passing over the defendant's track at some given point, or have been using it as a footpath between different points, as he and others had been taking coal from the yard. Under this exception, a duty is owed to keep a lookout for such trespassers. However, the court clearly distinguished that group of trespassers from the plaintiff in that here the plaintiff was not using the tracks as a member of the public; instead, he was in the railroad yard for the purpose of taking property that did not belong to him. In *Ducoulombier v. Thompson*,[5] the plaintiff was picking up wheat along the defendant's switch track when he was injured by a switching movement of the defendant's cars. The plaintiff, however, did not have any substantial evidence to show that the cars were moved by or with the authority of anyone who had knowledge that the plaintiff was in a position of peril from such movement.

It was held erroneous, in *Grosvener v. New York Central R. R.*,[6] to instruct the jury that whether defendant's conduct in moving cars in the railroad yard was negligent depended on whether or not it was being made in accordance with the usual practice and custom prevailing in the defend-

3. 342 Mo. 1239, 119 S. W. (2d) 797 (1938).
4. 343 Mo. 310, 121 S. W. (2d) 731 (1938).
5. 343 Mo. 991, 124 S. W. (2d) 1105 (1938).
6. 343 Mo. 611, 123 S. W. (2d) 173 (1938).

ant's railroad yard. The custom or practice might very well be a reasonable one, in the abstract, and yet not one in which the ordinary reasonable man would indulge under the circumstances of the particular case. The court quoted the observation of Mr. Justice Holmes: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."[7]

2. Lessors

The general rule is that landlords are not required, absent a statute or ordinance, to maintain lights in the common hallways for the benefit of their tenants and visitors. However, if a landlord undertakes to furnish lights, what is his duty? This question was presented in *Barber v. Kellogg*,[8] in an action by a tenant against a landlord for injuries sustained when the tenant fell while descending a winding stairway, where the tenant pleaded specific negligence in that the landlord failed to furnish sufficient light for the stairway and failed to have a switch at the top of the stairway to turn on the light at the bottom of the stairway. The Kansas City Court of Appeals held that if a landlord undertakes to furnish lights then he must exercise reasonable care to persons lawfully on the premises; that the evidence in this case failed to show a breach of duty in that it failed to show that the defendant had ever assumed the obligation of turning on the lights; and showed that this had been performed and assumed by the tenants. The supreme court ruled that if the defendants furnished lights for the illumination of the stairway and expected the tenants to perform the duty of turning on the lights, then it was at least a question for the jury whether reasonable care required that the defendants should furnish switches at convenient points for this purpose. However, the case was reversed and remanded because of error in an instruction given for the plaintiff which authorized a verdict on general negligence when the petition alleged specific negligence.

3. Municipal Corporations

Injuries resulting from conditions in streets and sidewalks were the basis of two cases against municipalities. In *Blackburn v. City of St.*

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7. Texas & Pac. Ry. v. Behymer, 189 U. S. 468, 470 (1903).
8. 123 S. W. (2d) 100 (Mo. 1938).

Louis,[9] a pedestrian brought suit against the city for injuries sustained as a result of being struck, while on the sidewalk, by an automobile which was deflected from its course after colliding with an ellipsoidal traffic button about four inches in height. These traffic buttons were attached to the surface of the street at a lighted intersection, about five feet from street car tracks and about twelve feet from the curb, to designate the boundary of a safety zone for passengers of street cars as authorized by ordinance. This was held to be a reasonably safe means for regulating traffic, notwithstanding such buttons were painted and did not have reflectors as authorized by the ordinance. The maintenance of these buttons to designate the boundary lines of the safety zones for street car passengers at all intersections was a governmental rather than a corporate function of the city, since such traffic buttons alone solely served to regulate traffic. The court distinguished between inherently dangerous obstructions or plans for the regulation of traffic and a reasonable device, such as this, where it seemed unreasonable to believe that they could cause damage unless the driver of a motor vehicle not only committed a misdemeanor in violation of the ordinance but also drove in a most unusual and careless manner. The protection to the public by such regulation greatly outweighed the injuries that might be caused by careless driving against these buttons.

In *Fourcade v. Kansas City*,[10] the plaintiff recovered against the city for injuries received from a fall when a coalhole cover in a sidewalk tilted, the evidence showing that the lid was old, worn and warped, and did not safely fit the rim at the time of the injury. Since the defendant made no issue on the question of notice in time for correction thereof before the injury, it was not error in not requiring a finding that the defendant defectively constructed the lid and rim. The allegation in the petition that the defendant defectively constructed the lid and rim only went to the question of notice to the defendant of the condition of the lid and rim in time to have corrected the same before the injury.

4. Operator of a Motorcycle

The duty imposed upon a motorcyclist was raised in *Oesterreicher v. Grupp*.[11] The trial court had instructed the jury "that under the law it was

9. 343 Mo. 301, 121 S. W. (2d) 727 (1938).
10. 342 Mo. 847, 118 S. W. (2d) 1 (1938).
11. 119 S. W. (2d) 307 (Mo. 1938). The question is raised in connection with plaintiff's contributory negligence, but it is of greater importance under the duty problem in general and is, therefore, set forth in this connection.

the duty of the plaintiff at the time and place described in the evidence to exercise the highest degree of care in the operation of his motorcycle and avoid colliding with defendant's automobile." This was held to exact far greater care, skill and foresight than exacted by the law and hence was reversible error. The use of the word "and" in lieu of the word "to" embraced the thought that if humanly possible it was the duty of the operator of the motorcycle to avoid the collision, and permitted the jury to measure the operator's obligation to avoid the collision by the care, skill and foresight exercised by a very competent and prudent person under like or similar circumstances.

B. *Breach of duty established through violation of statute or ordinance*

The duty and breach of duty, which constitute negligence, may be shown through violation of a statute which was intended to protect persons of the class to which the plaintiff belongs against the kind of injury which he has received. In *Jones v. Chicago, Burlington & Quincy R. R.*,[12] the plaintiff, a crop-sharing tenant farmer of certain lands, sought to recover for the damage done to his growing crops by overflows, alleged to have resulted from the negligent and wrongful failure of defendant to maintain suitable and adequate openings and outlets across and through its right of way, so as to permit the drainage and escape into the Mississippi River of the high water carried in the streams which flow into and through the general territory in which the plaintiff's farming operations were conducted. A Missouri statute makes it a duty of every company owning or operating a railroad in this state to cause to be constructed and maintained suitable openings across and through the right of way and roadbed of such railroad so as to afford a sufficient outlet to drain and carry off the water, including surface water, along such railroad, whenever the draining of such water has been constructed or rendered necessary by the construction of the railroad. The petition was based upon specific acts of negligence and did not allude to the statute. The court held that he was not to be precluded on that account from insisting, on appeal, that his cause of action was based upon the violation of the statute, and not on specific acts of negligence. "One who desired to avail himself of a public statute," says the court, "is not required to plead the statute by distinct mention of it or reference to it, but is only required to plead the facts which bring his case within its purview." The court also held that the phrase "surface

12. 343 Mo. 1104, 125 S. W. (2d) 5 (1938).

water" in the statute includes water overflowing from a stream or water course as well as that falling as rain upon the surface of the land, and that highwater outlets into a slough and other depressions, which have been shut off by railroad embankments, were "water courses" within the meaning of the statute.

A common situation of negligence, predicated on violation of a statute designed for the safety of the employees of railroads, is found in *Arnold v. Alton R. R.*[13] There a window in a locomotive flew outward when the engineer put the locomotive in reverse in making a drop switch, and when the locomotive was started forward the window slammed back and broke, causing particles of the glass to strike the fireman in the face. This was found to be caused by the absence of a hook and screw eye from the clear vision window in the locomotive, in violation of the Federal Boiler Inspection Act which applies to and includes all parts and appurtenances of a locomotive. In *Cason v. Kansas City Terminal Ry.*,[14] the action was brought under the Federal Safety Appliance Act for injuries allegedly caused by a defective hand brake on the freight car on which plaintiff, a switchman, was riding. In *Aly v. Terminal R. R. Ass'n of St. Louis*,[15] the action was brought under the same act for injuries sustained by a switch foreman who fell when he stepped on the footboard of an engine, which was alleged to be defective.

C. *Res ipsa loquitur*

Where a thing which has produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such that in the ordinary course of events does not happen if due care has been exercised, the fact of injury under these circumstances is sufficient to support a recovery in the absence of any explanation by the defendant tending to show that he was free from negligence. In *Berry v. Kansas City Public Service Co.*,[16] the plaintiff's evidence clearly showed to the jury what negligence on the part of the defendant caused the injury and left no doubt about the cause of the collision. Under this state of the record there was no occasion for the application of *res ipsa loquitur*, so that an instruction based upon the doctrine was inapplicable. However, in *State ex rel.*

13. 343 Mo. 1049, 124 S. W. (2d) 1092 (1938).
14. 123 S. W. (2d) 133 (Mo. 1938).
15. 342 Mo. 1116, 119 S. W. (2d) 363 (1938).
16. 343 Mo. 474, 121 S. W. (2d) 825 (1938).

Reeves v. Shain,[17] where defendants did not file any motion to make plaintiff's petition charging only general negligence definite and certain, asked for an instruction on general negligence, and did not ask for any instructions on specific negligence, they could not complain of a submission on a theory of general negligence although plaintiff's evidence showed specific negligence. On the other hand, the fact that the defendant's witness disclosed the specific defects in a platform which caused injuries to the plaintiff did not require the plaintiff, in *Philibert v. Benjamin Ansehl Co.*,[18] to submit his case on specific negligence.

D. *Imputed negligence*

The question of imputed negligence was presented in *State ex rel. Steinbruegge v. Hostetter*,[19] in an action for injuries sustained by a pedestrian when struck by a dealer's automobile which was driven by a salesman. The St. Louis Court of Appeals had held the presumption that an automobile was driven by a regular employee of the defendant within the scope of his employment, which arises on proof of the defendant's ownership of the automobile and that it was being driven by a regular employee of the defendant, did not disappear upon the dealer's introduction of substantial evidence to the contrary. This was held to be in conflict with controlling rulings of the Missouri Supreme Court.

In *Vert v. Metropolitan Life Insurance Co.*,[20] a life insurance company, not reserving the right to direct how its agent should travel, nor expressly or impliedly directing his travel, for the purpose of selling old line life insurance outside the territory in which he was required to collect industrial insurance premiums, was held not liable for injuries to the plaintiff as a result of the agent's negligence in the operation of his automobile while returning to such territory after going outside of it for such purpose, although the company knew that he used the automobile for transportation while soliciting such insurance. The fact that the insurance company's rules, requiring that its agent's representations conform to the company's instructions, instructing them as to the collection of premiums, and forbidding them to pay premiums, transfer commissions, allow premium

17. 343 Mo. 550, 122 S. W. (2d) 885 (1938).
18. 342 Mo. 1239, 119 S. W. (2d) 797 (1938).
19. 342 Mo. 341, 115 S. W. (2d) 802 (1938).
20. 342 Mo. 629, 117 S. W. (2d) 252 (1938).

rebates and cash company or premium checks, did not show the right to direct or control the agent's physical activities in soliciting prospects to purchase old line insurance outside of his industrial insurance territory so as to render the company liable for the injuries.

E. *Causation*

Assuming negligence on the part of the defendant to have been made out, there is still the question of causation or responsibility in law to be determined. The problem on concurrent causation was involved in two cases, neither of which presented new or novel situations. In *Stollhans v. City of St. Louis*,[21] a pedestrian, due to deep mud on the city sidewalk, was compelled on a misty night to walk in the street extensively traveled with fast traffic. While walking on the right side of the street, and while giving attention to traffic, he was struck by an automobile approaching from the rear, just after another automobile with very bright lights approaching from the opposite direction had passed the pedestrian. The defendant contended that the negligence of the operator of the automobile was an intervening cause which prevented the city's negligence from being the proximate cause of the plaintiff's injury. The court held the question whether or not the city's negligence was a concurrent cause of the plaintiff's injury was for the jury, and an instruction so worded that the jury might reasonably believe that the city was not liable, if the injuries were due in any part to the negligent driving by the operator of the automobile, was prejudicially erroneous.

Where the concurring force was an act of God, but it was not shown that the flood or volume of high water was so great that the damage to the plaintiff would have resulted regardless of any question of the defendant's negligence in failing to maintain sufficient outlets for water to pass through its roadbed, the defendant was held responsible for the damage, in *Jones v. Chicago, Burlington & Quincy R. R.*,[22] even though some outside and extraneous force, such as an act of God, might have contributed to the final result.

F. *Defenses in negligence cases*

In the period under review there were a number of interesting questions pertaining to contributory negligence presented to the court. In

21. 343 Mo. 467, 121 S. W. (2d) 808 (1938).
22. 343 Mo. 1104, 125 S. W. (2d) 5 (1938).

Gardner v. Turk,[23] in parent's action against motorist for the death of an eleven year old son who was struck while walking on the street, where the evidence showed that the parents knew that the street was heavily traveled, that pedestrians walked in the street because of a lack of sidewalks and that son intended to walk on the street when he left home, the question of the parent's negligence was for the jury. Since the child was not capable of exercising the care of an adult, those having the custody of and authority over such child and whose duty it was to care for and safeguard such a child should, so far as reasonably possible, prevent him from going into a danger known to them but which, because of the child's immaturity, he may not appreciate.

Pearrow v. Thompson[24] was an action for injuries sustained when the plaintiff was struck by freight cars while crossing a switch track at a public road crossing. Whether the plaintiff, who had looked for trains on the main track while crossing it nearby with a harrow on his back, who knew that the cars had been stationary on the switch track for five or six hours, and who had passed over the crossing below them only a few minutes before on his way to get the harrow and mule, but who had heard that cars sometimes got loose and ran down the track, was contributorily negligent in not anticipating that they might get loose and start rolling between the time he walked from the main track to the switch track, was held for the jury.

Where, in an action for injuries received while driving his automobile and skidding into a barricade in the center of a slippery street on a foggy, rainy night, the plaintiff's evidence showed that he already had information, from previous experience in using his brakes, as to what would happen if he had to apply them suddenly, yet deliberately drove faster to pass an automobile ahead of him on a street he knew was partially blocked by construction work, he was held to be contributorily negligent as a matter of law in *Baranovic v. C. A. Moreno Co.*[25] The court distinguished the case from one where the driver is suddenly confronted by an unknown condition.

It is well settled law in Missouri that a guest in an automobile is required to exercise ordinary care and prudence for his own safety, and may not intrust his safety absolutely to the driver, yet he is not required to use the same vigilance as the driver. Whether the guest had exercised

23. 343 Mo. 899, 123 S. W. (2d) 158 (1938).
24. 343 Mo. 490, 121 S. W. (2d) 811 (1938).
25. 342 Mo. 322, 114 S. W. (2d) 1043 (1938).

reasonable care was raised in *Gorman v. Franklin*[26] and in *Buehler v. Festus Mercantile Co.*[27] By dictum, in *Edwards v. Woods*,[28] a driver of a car is not negligent as a matter of law because he rests his arm upon the doorframe of the car, especially where in doing so his elbow would not extend beyond the fender of the car.

Where there was no place to walk except in the street, it was held in *Stollhans v. City of St. Louis*[29] not to be contributorily negligent as a matter of law to do so, even though it was a misty night. There the plaintiff was struck by an automobile approaching from the rear while so walking, at about the same time that another automobile with very bright lights was approaching and passing the plaintiff from the other direction. The court recognized the equal right of a pedestrian to be upon and use the traveled part of the highway, that while so walking it is not as a matter of law his duty to turn about constantly to observe the approach of possible vehicles from the rear, and that, on the contrary, he may assume that the operator of an automobile will exercise the requisite care in keeping a lookout, that under ordinary conditions he will be discovered by the operator, and that the latter will, as he approaches, slow down and give an audible signal with his horn.

Where the view of one about to enter upon a railroad crossing is obstructed by standing cars, the question of what conduct is necessary to relieve him of contributory negligence was presented in *Scott v. Kurn*[30] and *Rucker v. Alton R. R.*[31] At least he is not contributorily negligent as a matter of law if he fails to stop to look and listen.

An interesting question of pleading the defense of assumption of risk was presented in *Grosvener v. New York Central R. R.*,[32] in an action to recover for personal injuries under the Federal Employers' Liability Act. Where the assumption of risk is tantamount to contributory negligence it must be pleaded affirmatively under this act according to Missouri law. But the court calls attention in a footnote to the principal case that contributory negligence is interposed as an affirmative defense in bar to a recovery based upon primary negligence under the Missouri law; whereas under the Federal Employers' Liability Act it is pleaded in mitigation of

26. 117 S. W. (2d) 289 (Mo. 1938).
27. 343 Mo. 139, 119 S. W. (2d) 961 (1938).
28. 342 Mo. 1097, 119 S. W. (2d) 359 (1938).
29. 343 Mo. 467, 121 S. W. (2d) 808 (1938).
30. 343 Mo. 1210, 126 S. W. (2d) 185 (1938).
31. 343 Mo. 929, 123 S. W. (2d) 24 (1938).
32. 343 Mo. 611, 123 S. W. (2d) 173 (1938).

damages, and under Missouri law evidence in mitigation of damages may be given under the general denial. The problem is not solved.

G. *Humanitarian doctrine*

Due to the significance of this doctrine in the Missouri decisions, this phase of Torts is given special emphasis in a special topic which will be found elsewhere in this issue of the *Review*.[33]

H. *Burden of proof*

After a period in which the court has scrutinized closely instructions on the burden of proof in negligence cases, apparently lawyers and trial courts are following more closely instructions that have been approved by the court. In one case, *Grosvener v. New York Central R. R.*,[34] the trial court followed an instruction on the burden of proof which had met the approval of the court in an earlier case,[35] but inserted the sentence: " 'Negligence is a positive wrong, and, therefore, in this case is not to be presumed.' " The court, in a previous decision, had pointed out the error in stating that negligence was a positive wrong: "A positive wrong is a wrongful act, willfully committed. . . . In order to commit a positive wrong there must be an intent."[36]

II. Fraud

Jeck v. O'Meara[37] was again before the court on a second appeal.[38] The action was against the manufacturer and distributor of automobiles for deceit in inducing the plaintiff to invest money in the company retailing the automobiles, which investment proved worthless. The manager represented himself and the manufacturer as though he owned the stock or was authorized to speak for the owners, and represented that the company was solvent. The defendants contended that there could be no recovery, even if the deceit was made out otherwise, because the representation as to the solvency of the distributor was not in writing as required by Section 2970

33. Discussed by Mr. Becker.
34. 343 Mo. 611, 123 S. W. (2d) 173 (1938).
35. Doherty v. St. Louis Butter Co., 339 Mo. 996, 98 S. W. (2d) 742 (1936).
36. Blunk v. Snider, 342 Mo. 26, 111 S. W. (2d) 163, 165 (1937).
37. 343 Mo. 559, 122 S. W. (2d) 897 (1938).
38. For the first appeal, see 341 Mo. 419, 107 S. W. (2d) 782 (1937), noted in (1938) 3 Mo. L. Rev. 69.

of the Missouri Revised Statutes, 1929, which provides that "no action shall be brought to charge any person upon and by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and subscribed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." The court pointed out that the statute does not apply " 'when the primary purpose of such representations was not to induce the extension of credit or delivery of money or goods to the persons concerning whom they are made but to secure the execution of a contract to which the person making them is a party.' " Furthermore, the statute does not apply where the owners of the stocks of a corporation make false or fraudulent representations concerning the assets and financial condition of such corporation in promoting and effecting the sale of such stocks. While it was true, in the instant case, that the defendants were not the owners of the stock purchased by the plaintiff, and were not parties to the agreement to purchase, the statute was not applicable since the defendant O'Meara spoke at the conferences as though he was one of the owners of the stock in the distributor or was authorized to speak for the owners of such stock and for the company.

The defendants also requested an instruction which would have told the jury that the plaintiff could not recover, unless it were found that he relied solely on the alleged false representations, and that he could not recover if it were found that he relied in whole or in part on the recommendations of his counsel. The court reiterated its previous position on this question that it is not necessary to show that the false representations complained were the sole inducing cause, but that it is sufficient if they were an effective cause along with other considerations. If they are a material influence in inducing the plaintiff to act, although they constitute only one of the several factors which acting together to produce the result, it is sufficient.

TRUSTS

W. L. NELSON, JR.*

I. IMPLIED TRUSTS

A. *Resulting Trusts*

Purvis v. Hardin[1] was an action to establish a resulting trust in certain real estate which the plaintiff, a sister of the defendant, alleged had been purchased with money advanced by the defendant under an oral agreement providing that he was to purchase the land, sell it and share the profits with the plaintiff and another brother. Title to the property was taken in the name of the latter and he later conveyed to the defendant. The lower court found that the defendant was the owner of the land and that the plaintiff had no interest in it.

In affirming this decision the supreme court referred to the well-established rule that a mere preponderance of the evidence is insufficient to establish a resulting trust and that such evidence must be "so clear, cogent, and convincing" that no reasonable doubt can be entertained as to its truth. It held the test to be the true ownership of the consideration, which here was furnished by the defendant, and said that the alleged oral agreement could furnish no basis for a resulting trust since it must arise by operation of law from the facts in the case and not from any agreement. The court further stated that trustee's mere refusal to execute an express trust, or his denial of its existence, does not furnish the basis for raising a constructive trust.

B. *Constructive Trusts*

Suhre v. Busch[2] was a suit to impress a constructive trust on certain shares of stock which had formerly been owned by the plaintiff but which were now in the hands of the executors of one Busch. Plaintiff asserted that Busch had purchased the stock, through an agent, from a broker who bought it from plaintiff's immediate transferee, and that the broker had been induced to part with the stock on the alleged agent's representations

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1. 343 Mo. 652, 122 S. W. (2d) 936 (1938).
2. 343 Mo. 679, 123 S. W. (2d) 8 (1938).

that he was buying it to hold for the plaintiff until she was able to redeem it. The trial chancellor found for the defendants and on appeal that judgment was affirmed by the supreme court.

After pointing out that the machinery of a constructive trust is used to effect restitution for one deprived of property by the wrongful or fraudulent act of another, the court emphasized the fact that when the broker here held the stock he was the absolute owner thereof, that the plaintiff had no interest or right in it at that time, that she lost nothing when the alleged fraud was perpetrated upon the broker, and that the latter sustained the damage, if any, which was caused thereby. The court also stated that the plaintiff had failed to supply the "extraordinary degree of proof" required to establish an implied trust.

II. Removal of Trustees

In *Shelton v. McHaney*,[3] the beneficiaries of a testamentary trust brought proceedings to remove the trustees named by the testator, alleging that the trustees had been derelict in their duties in that, among other acts, they had allowed one of the trustees compensation for his services as an attorney, had sold certain real estate and shares of stock which made up a part of the estate, had made expenditures for counsel fees and to physicians who had consulted with the trustees and testified in the defense of a suit to set aside testator's will, and had been hostile to the beneficiaries. After stating the provisions of the will, which vested broad powers in the trustees and recited that they were substituted in the testator's place and stead as near as practicable, the court affirmed the lower court's decree, which was in favor of the defendants.

The court held that improper motive or fraudulent design on the part of the trustees had not been disclosed and that if they had overstepped the law or the discretion vested in them reimbursement to the estate would be ample redress for the plaintiff. It stated that misconduct which would authorize the removal of trustees must be of such a nature as to endanger the trust estate, that mere hostility between the trustees and *cestuis* was not a sufficient ground for removal, and that removal "calls for the exercise of a sound judicial discretion, which should not be abused."

3. 343 Mo. 119, 119 S. W. (2d) 951 (1938).

III. Right of Action by Beneficiary

State ex rel. North St. Louis Trust Co. v. Wolfe[4] was an original proceeding in prohibition directed against a circuit court judge. A legatee under a will had filed an affidavit to discover assets, alleging that one Ethel Funk, also a legatee, was wrongfully withholding certain property, including a five thousand dollar bond, from the estate. The latter answered and admitted that she held the property but stated that the bond was being held in trust for a named *cestui.* The purported *cestui* then filed suit against the executor and Ethel Funk asking that the court order that possession of the bond be delivered to her.

The trust company, which had been named executor, brought this proceeding and asked for the writ on the ground that the probate court had exclusive jurisdiction. It also raised the point that the *cestui* could not maintain the circuit court suit against the person alleged to be the trustee and against the executor, since the latter claimed title adverse to the trustee. The authority for this contention was the statement in *Corpus Juris* that "a *cestui que trust* cannot maintain a bill in equity against the trustee in possession and a third person who claims a legal title adversely to the trustee to settle the conflicting claims."[5] The court disposed of this argument on the ground that inasmuch as it is the policy of equity to bind everyone who has any interest in the property involved in the litigation, all such persons are to be made parties to the suit. The preliminary writ was then made permanent, except as to the alleged trust, the court holding that the probate court had exclusive jurisdiction in the first instance to determine the other issues raised by the proceedings in that court.

IV. Right to Follow Trust Property or Proceeds

Brown v. Maguire's Real Estate Agency[6] involved the title to rent money collected by the agency. Execution was issued on a judgment for the plaintiffs and the bank in which the agency was in the habit of depositing rental collections was summoned as garnishee. A day later, but before notice of the garnishment had reached it, the agency deposited a rent payment which it had been authorized to collect and remit to the owners of certain property. These persons filed interpleas, claiming the amount of

4. 343 Mo. 580, 122 S. W. (2d) 909 (1938).
5. 65 C. J., § 938, pp. 1009, 1010.
6. 343 Mo. 336, 121 S. W. (2d) 754 (1938).

that deposit on the theory that the agency's relation to them was that of trustee, and that the rent collection was a trust fund which could be traced to and found in the agency's bank account. The garnishee bank contended that it had the right to apply this deposit, as well as another small account, to a note which the agency had executed to the bank. The note was not due at the time of the garnishment but it contained a provision that the bank should have a lien on the agency's deposit account. The judgment creditors' position was that the fund was subject to garnishment because the relation between the bank and the agency, and between the agency and the interpleaders, was that of debtor and creditor, but that inasmuch as the note was not due, the bank did not have the right of set-off.

The supreme court, to which the case had been certified after an appeal by the intervening claimants from the trial court's order that the bank turn the money into the court, held that the rent money constituted a trust fund held by the agency for the owners of the property, and that although the deposit created a debtor and creditor relationship between the agency and the bank, the agency was a depositor as a trustee, not as an individual, and that if the bank had knowledge of the trust or could have obtained such information by reasonable investigation (which was found to be the case here) it could not set off the trustee's personal debt against the trust fund. The court further ruled that the bank could apply the amount of the deposit in excess of the rental collection to the unmatured note, since a lien was provided for by the note, and the garnishment could not disturb that lien.

V. Liabilities on Trustees' Bonds

State ex rel. Clark v. Shain[7] was a *certiorari* proceeding to review the judgment and opinion of the Kansas City Court of Appeals in an action on a trustee's bond to recover a trust fund, the receipt of which one Davis, while acting as trustee, had acknowledged from himself as executor. The bond was expressed to be upon condition that the trustee had been appointed "to receive, take charge of and administer" the trust fund, and it provided that if he faithfully performed the trust, paid over and accounted for the money the obligation was to be void. The successor trustee obtained judgment on the bond in the circuit court but this action was reversed by the court of appeals. It held that the surety bond, properly

7. 343 Mo. 66, 119 S. W. (2d) 971 (1938).

construed, protected only the money which came into the trustee's hands as trustee, and that there was a failure of proof that Davis, while acting as executor, had transferred the fund to himself as trustee.

The supreme court, in quashing the writ of *certiorari* on the ground that there was no conflict with controlling supreme court decisions, referred to an earlier case which was decided on very similar facts.[8] That case ruled that a person in charge of a fund in one capacity could not, by merely signing a receipt for the fund while acting in another capacity, but without actually transferring the fund, shift responsibility therefor from one set of sureties to another. The court further stated that no decisions had been cited holding sureties liable for a trustee's fraud in receipting for a fund which he had not actually received.

Buder v. Holt[9] was a suit in equity by a trustee against the commissioner of finance, who was in charge of a closed bank, to have a deposit of trust funds set off against two notes which the trustee individually owed the bank. The court stated the general rule to be that when trust funds are deposited in a bank the trustee, on the insolvency of the bank, may set off such deposit against his individual indebtedness to the bank only if he is personally liable to the beneficiaries for the amount of the deposit. The plaintiff asserted that there was such a personal liability here because he and his co-trustee had given surety bonds conditioned that they should, on the termination of the trust, "well and truly account for and pay over and deliver" the property coming into their possession as trustees. The court denied this contention and further said they could find no case holding that "the principal and his surety under the usual fidelity bond are *insurers* of the trust fund, regardless of a breach of trust on the part of the trustee."

WILLS AND ADMINISTRATION

THOMAS E. ATKINSON*

As in previous years, few new and important points of the law of succession were decided by the supreme court. Questions of construction

8. State *ex rel.* Hospes v. Branch, 151 Mo. 622, 52 S. W. 390 (1899).
9. 343 Mo. 666, 117 S. W. (2d) 235 (1938), (1939) 4 Mo. L. REV. 332.

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of wills predominate, with will contest litigation second in frequency. Such cases, though of course important to the parties, do little to establish precedents which will help settle the law. In the field of administration the decisions are exceeded both in number and in jurisprudential value by those of the courts of appeals. This is because most questions of probate court practice are not likely to involve either the title to realty or the sum of $7500 so as to permit an appeal to the supreme court. Doubtless the situation will continue until there is a change in our court organization and appellate jurisdiction.

I. Contest of Wills

Proffer v. Proffer[1] establishes the rule, forecast by earlier cases, that the contest of a will devising land involves title to real estate so that an appeal lies to the supreme court. The jury's decision against the will on the ground of testator's mental incapacity was held sustained by evidence of his foolish financial transactions and indulgence in petty thefts after a long life of honesty. In *Fowlkes v. Stephens,*[2] the judgment below upholding the will was reversed because the trial court, after defining the mental capacity required to make a valid will, further instructed the jury that old age, physical weakness or imperfect memory caused by sickness, or old age, or forgetfulness of the names of persons testator had known, were not sufficient to invalidate the will provided the deceased had sufficient intelligence to fulfil the foregoing definition. This part of the charge was admitted to be a correct statement of an abstract point of law but was condemned as argumentative, as commenting on the evidence, and as tending to mislead the jury into the belief that the named factors were not to be considered in determining whether deceased had mental capacity as defined in the previous part of the charge. Earlier Missouri cases sustain this position but it seems to the writer that, if this distrust of juries is warranted, the situation calls for total abolishment of jury trial in will contest cases.

In *Larkin v. Larkin,*[3] the lower court's direction of a verdict in favor of the will was sustained against the claim of undue influence. While admitting that such charges may be proved by circumstances, it was held that no case for the jury was made out by the will's unequal distribution among testator's children, or by proof of a statement by the chief benefici-

1. 342 Mo. 184, 114 S. W. (2d) 1035 (1938).
2. 342 Mo. 247, 114 S. W. (2d) 997 (1938).
3. 119 S. W. (2d) 351 (Mo. 1938).

ary that if it had not been for him there would have been no will. The court also reiterated its recent holding that the mere showing of a confidential relationship between the testator and the beneficiary did not raise a presumption of undue influence and further held that the showing of this relationship did not warrant, by itself, a submission of the case to the jury.

The will in *Campbell v. St. Louis Union Trust Co.*[4] was contested below by the guardian of testator's incompetent brother, who was the sole heir at law. In their answer, the trustees under the will denied that testator was of unsound mind or was unduly influenced and further prayed that the contest be enjoined because it was without basis and inspired by collateral relatives who had threatened to sue upon the guardian's bond unless a contest was filed. In holding that the trial court erred in refusing to strike this equitable counterclaim it was declared that defendant had an adequate remedy at law, viz., by proceeding with the trial of the contest upon the issues raised by the denials contained in the answer. This decision seems correct, for otherwise contestees might avoid jury trial merely by questioning the motives of contestants. However, in some situations of this general character a summary judgment for contestees might be warranted if legislation provided for such remedy.[5]

In this general connection it is interesting to notice that if the decedent had made his disposition by deed rather than by will, there would be court trial of the issues of mental capacity and undue influence. This is illustrated by two deed cases[6] decided in 1938. The similarity of the issues arising in the will and deed cases is shown by the fact that will cases are cited in the deed cases.[7]

II. Construction of Wills

In three cases involving the problem as to whether a devisee took a fee or merely a life estate under the will, the court refused to hold controlling the doctrine that language sufficient to create a fee cannot be annulled except by language equally clear cutting down the fee. The court found in each instance that the entire will showed testator's intention to give only a life estate. Testator, in *Presbyterian Orphanage of Missouri*

4. 343 Mo. 1041, 124 S. W. (2d) 1068 (1938).
5. See Federal Rules of Civil Procedure, rule 56.
6. Kingston v. Mitchell, 117 S. W. (2d) 226 (Mo. 1938); Platt v. Platt, 343 Mo. 745, 123 S. W. (2d) 54 (1938).
7. Rex v. Masonic Home of Missouri, 341 Mo. 589, 108 S. W. (2d) 72 (1937), cited in Kingston v. Mitchell, 117 S. W. (2d) 226, 228 (Mo. 1938).

v. Fitterling,[8] gave the residue of his estate to his brother to hold and enjoy the rents and profits with full power to sell and dispose of the same as he might think best and whatever portion of the estate remained upon the brother's death was to pass to plaintiff charity. This was held to create merely a life tenancy in the brother and the power of disposition was construed to be limited to sales for valuable consideration. In *Graham v. Stroh*[9] the will bequeathed all testator's property to his wife for the period of her widowhood, granting her power to sell, exchange, reinvest, lease and encumber as she might think best. This was followed by an expression of confidence that she would not disregard the interests of testator's children. A separate clause provided that if the wife should remarry or in the event of her death, the remainder of the estate or its substitute was devised to the children. This was held to create only a life estate in the widow and the power of disposition was not deemed repugnant to this life estate or the remainder over. In *Weller v. Searcy*[10] the will provided that testator's wife should take all that part of the estate to which she would be entitled under the law, as her absolute property, and devised the remainder to the wife to be applied for the support of testator's children during the life and widowhood of the wife with provision for division of the property among the children upon remarriage of the wife or upon her death. Testator's total estate was little, if any, greater than a homestead and personalty sufficient to cover family allowances. The court decided against the contention that the widow obtained the fee of the area covered by the homestead under the phrase "as her absolute property," and held that she took only the life interest she would have taken in case of intestacy. Testator's intention to this effect is declared to be shown by the provision for the children which would have been largely or entirely nugatory if the above contention were upheld.

Bates v. Bates[11] involves the question as to the time at which the individuals of a class of survivors are to be determined. By the second clause of his will testator left $300,000 in trust for his wife for life and at her death the sum remaining to such of the parties named in the eighth clause "as may be then living." The eighth clause left the residue to such of the following parties "as may be then living" including 3/11

8. 342 Mo. 299, 114 S. W. (2d) 1004 (1938).
9. 342 Mo. 686, 117 S. W. (2d) 258 (1938).
10. 343 Mo. 768, 123 S. W. (2d) 73 (1938).
11. 343 Mo. 1013, 124 S. W. (2d) 1117 (1938).

thereof to trustees for the benefit of testator's sister as thereafter set forth. A subsequent part of this clause provided that said 3/11 portion of the residue should be invested and reinvested, the income to be paid to the sister during her lifetime and at her death the said 3/11 to be equally divided between her two sons and her grandson or the survivor of them. Both the sister and one of her sons died prior to the wife's death. After the latter event the widow of the deceased son of the sister claimed that the remainder interest of the 3/11 of the trust fund vested upon testator's death in his sister, though enjoyment was postponed during the wife's lifetime, that on the sister's death this remainder passed to her two sons by descent and on the death of the son (claimant's husband) claimant took his share under his will. This claim was based upon the rule of construction favoring the vesting of estates. However, the supreme court decided against this contention and construed the phrase "as may then be living" in the second clause as of the death of testator's wife (the life tenant) and not at the death of the testator upon the ground that the word survivors or its equivalent must be construed to mean those surviving at the termination of the particular life estate. In addition the court points out that from the clear wording of the eighth clause the sister was entitled, in no event, to any descendible interest in the fund.

In *Marr v. Marr*,[12] the fifth clause of the will directed the executor "to use sufficient of funds . . . to purchase a security, interesting bearing in the sum of $500" for the benefit of his grandson. The latter contended that a sum should be set aside sufficient to yield $500 annual interest. Testator also left a widow, son, and mother mentioned in his will. The evidence showed that testator had held large property interests but that at the time of the execution of the will he was close to insolvency and realized this fact. In rejecting the grandson's contention, it was held that the words "in the sum of $500" fixed the par or face value of the security to be purchased. The court did not directly pass on the admissibility of the evidence as to testator's financial condition, but as both parties treated this as admissible the court declares that its construction is fortified by these facts admitted without objection. However, testator's declaration that he intended the grandson to have $500 was held incompetent as permitting a will to be made by parol in violation of the statute requiring a writing. The trial court's allowance of $1000 from the estate as fees to the attorney

12. 342 Mo. 656, 117 S. W. (2d) 230 (1938).

for the grandson was held improper, being an inducement to will construction litigation when the wording is plain and unambiguous.[13]

Buder v. Stocke[14] involves questions of ademption and payment of legacies and is probably the most interesting case decided in the field of succession during the year. The will made in 1926 left to testator's son "all my holdings of stock" in a brick company "and any and all notes obligations or claims which I now hold of said company, whether evidenced by notes or otherwise due me on open account." The charter of the corporation had been forfeited by the state in 1921 but operation of the business continued as before. Just prior to the execution of his will, testator purchased the interest of a minority stockholder and thereafter owned substantially the entire business. The supreme court held that the bequest was not merely of stock in, and obligations of, the corporation but was broad enough in language to cover testator's entire equity in the business and his claims against it, whether it was a corporation, a partnership or an individual business.[15] It was further held that there could be no ademption of the legacy by virtue of forfeiture of the charter or other facts occurring prior to execution of the will.

In 1929 testator was adjudged incompetent and remained under guardianship until his death about two years later. The guardians caused the brick company real estate to be transferred to testator's name and liquidated the business by paying the debts, in part out of the business personalty and in part out of individual funds of the testator. It was held that there was no ademption of the bequest because of these acts of the guardians and that the son was entitled to the brick company realty, though he could receive no more under the will than he would have received if there had been no liquidation by the guardians or if the will had become effective when the guardianship began. The theoretical basis for holding that the acts of the guardians did not work an ademption is not made clear. Is it because their acts did not cause substantial change in the thing given? If so, it would seem to be immaterial whether the merely formal changes were effected by the guardians or by the testator himself. Or, is the holding based upon the doctrine that ademption is founded upon testator's intention and that transactions of guardians cannot cause ademption in any case, the legatee being entitled to the value of the thing given at the

13. See note (1938) 3 Mo. L. Rev. 330.
14. 343 Mo. 506, 121 S. W. (2d) 852 (1938).
15. See note (1938) 3 Mo. L. Rev. 81.

time of the commencement of the guardianship? The cases cited seem to support this view though there is also strong authority to the contrary.[16]

The final point in the case has to do with the payment of certain pecuniary legacies to testator's children and step-children under a clause of the will which taken by itself undoubtedly constituted them general legacies. The residuary clause set up a trust in favor of testator's children and a subsequent part of the will provided that if the funds on hand were insufficient to pay legacies the executors were empowered to sell a described farm for this purpose. It was held that this clause did not make the legacies payable only from funds on hand and the proceeds of the farm but that the legacies were in fact demonstrative and payable from general assets if the designated funds proved insufficient.[17] This conclusion is reached both on the basis of the language of the will and evidence of the condition and value of testator's estate and of his relationship with the beneficiaries at the time of execution of the will.

The question as to whether certain instruments are valid deeds creating estates in future, or are invalid as conveyances because of their testamentary character continues to arise. In *Goins v. Melton*,[18] the instrument was in the form of a warranty deed with an added clause retaining in the grantor possession and control of the profits for life and also the right to sell the land, at his death the title to all, or the part unsold, to pass to the grantee together with all grantor's personal property. The court admits its inability to lay down any uniform test as to testamentary character but finds that the reserved power to sell was equivalent to a power to revoke and the instrument was therefore held testamentary and ineffective as a deed. In overruling a motion to transfer to banc the court refused to find that a trust was created with power to revoke, because of absence of a trustee.

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16. See Matter of Ireland, 257 N. Y. 155, 177 N. E. 405 (1931), noted in (1931) 16 CORN. L. Q. 623, (1932) 45 HARV. L. REV. 710, (1932) 9 N. Y. U. L. Q. REV. 506, (1931) 79 U. OF PA. L. REV. 990, (1931) 17 VA. L. REV. 584.

17. For a very recent learned discussion of the devices used by the courts to prevent failure of legacies through ademption, see Mechem, *Specific Legacies of Unspecific Things—Ashburner v. MaGuire Reconsidered* (1939) 87 U. of PA. L. REV. 546.

18. 343 Mo. 413, 121 S. W. (2d) 821 (1938). See discussion of this case in division on Property, *supra* at note 1.

III. Rights of Family and Heirs

By a liberal application of the homestead laws it was decided in *Ahmann v. Kemper*[19] that a wife may assert homestead rights in an estate by the entireties after the death of her husband against an unsecured indebtedness incurred by herself and her husband subsequent to the recording of the deed creating the estate. While not technically involving a question of inheritance, *Eisenhardt v. Siegel*[20] makes clear that an heir or devisee, who kills his ancestor or testator but is insane and hence is not guilty of criminal homicide, may take under the intestate laws or under the will. *Clapper v. Lakin*[21] deals with the burden of proof upon the issue of legitimacy in a controversy involving inheritance.

IV. Administration of Estates

State ex rel. Pryor v. Anderson[22] holds that under our statutes the probate court has power to name a stranger as administrator forthwith when the intestate leaves no resident distributees. This state of the statute law seems to call for amendatory legislation as it gives undue advantage to swift-moving public administrators at the expense of non-resident distributees who may wish to become local residents in order to qualify as administrators.

In *State ex rel. Clark v. Shain*[23] it was held that the surety on a trustee's bond conditioned upon the faithful performance of the trust was not liable thereon when the trustee, who was also executor, failed to actually turn over to trust fund to himself as trustee, being insolvent at the time that he filed a voucher acknowledging receipt of the funds as trustee.

State ex rel. North St. Louis Trust Co. v. Wolfe[24] holds that the probate court has jurisdiction to determine title to personalty claimed as a gift from decedent upon a proceeding to discover assets, but that the question of whether the possessor held a part of the property in trust for another must be litigated in a separate circuit court action. Another case denying that the probate court has general equitable jurisdiction is *In re Ermeling's*

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19. 342 Mo. 944, 119 S. W. (2d) 256 (1938).
20. 343 Mo. 22, 119 S. W. (2d) 810 (1938), noted in (1939) 4 Mo. L. Rev. 210, (1939) 24 Wash. U. L. Q. 277.
21. 343 Mo. 710, 123 S. W. (2d) 27 (1938), discussed in division on Evidence, *supra*, at note 20.
22. 343 Mo. 895, 123 S. W. (2d) 181 (1938).
23. 343 Mo. 66, 119 S. W. (2d) 971 (1938).
24. 343 Mo. 580, 122 S. W. (2d) 909 (1938).

Estate,[25] involving a guardian's account. There the probate court issued an order disapproving loans made by the guardian, while the circuit court on appeal purported to cancel said loans which were secured by deeds of trust on realty. It was held that the action of the probate court was proper while that of the circuit court was improper, as that court upon appeal from probate court had no more equitable jurisdiction than the probate court.

It is significant that this point was decided in the process of holding that the supreme court had no jurisdiction of the appeal as title to realty was not involved. Furthermore, it should be noted that the other three cases treated in this section were decided upon *mandamus, certiorari* and prohibition respectively. This illustrates the narrow scope of review by the supreme court usually afforded under the present law in cases involving questions as to the administration of estates. Such a state of affairs is unfortunate because the legal problems arising daily in the course of the settlement of estates deserve—perhaps above all others—authoritative and final determination by our highest judicial tribunal.

WORKMEN'S COMPENSATION

JAMES A. POTTER*

Only four cases involving questions of workmen's compensation law were considered by the court during the year 1938.[1] Of the four, three were common law actions for damages, and one was an appeal from an award of the compensation commission.

Gardner v. Stout[2] involved the question of the time of termination of employment where an employee voluntarily quits. In this case employee, while performing his regular duties, was criticised by his foreman and as a result thereof announced to the foreman that he had quit his job, and then and there left his post of duty. He went immediately to his locker for his personal belongings and started to leave the building. On his way down the stairs the foreman assaulted him. Employee filed suit against

25. 119 S. W. (2d) 755 (Mo. 1938).

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had been awarded, and if the employe sued, he became trustee for employer
1. Only four cases were found. Reference to the record for previous years discloses that in 1937 eleven cases were considered and in 1936 thirteen.
2. 342 Mo. 1206, 119 S. W. (2d) 790 (1938).

the owners of the business and the foreman. Defense was that the compensation law applied. The plaintiff, employee, contended that the relation of employer-employee had ceased when he quit, and that the compensation law had ceased to apply at the time of his injury.[3]

In deciding this issue, the court held that whenever an employee is discharged or voluntarily quits his employment, the relation of employer-employee is not severed until the employee has had a reasonable time in which to leave the premises. Considering the facts of the case, the court held that the employee at the time of the assault had not had a reasonable time to leave the premises, that the relationship still existed, and that the compensation law applied. Hence, it was held that the employee could not maintain this action against his employers.[4]

In *Edwards v. Woods*[5] the court upheld the right of an injured employee to maintain an action against a third party where negligence caused the injury, in spite of the fact that such employee had received compensation from his employer.[6]

Urseth v. Encyclopedia Britannica,[7] involved the construction of subsections (c) and (d) of section 3320. Urseth had been employed as a traveling salesman on a commission basis, with a drawing account of $35.00 per week. He was killed in an accident less than a year later. Com-

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3. An interesting situation arose on the pleadings. The employers filed a demurrer to plaintiff's case, but did not include the foreman in the demurrer. Plaintiff contended they waived this defense by not including the foreman. However, the court held that employers preserved this right to have the question decided by excluding foreman from their demurrer, inasmuch as plaintiff made a submissible case as against the foreman, so that if he had been included in the demurrer it would have been necessary to overrule it.

4. The court remanded the case because of an excessive verdict. It was held as to the foreman that in spite of the compensation law forbidding a suit at common law against the employers, the injured employee still has his action against the foreman who committed the assault as a third party, upon whom no liability could be entailed under the Compensation Law. (Citing Sylcox v. National Lead Co., 225 Mo. App. 543, 38 S. W. (2d) 497 (1931); Hanson v. Norton, 340 Mo. 1012, 103 S. W. (2d) 1 (1937).

5. 342 Mo. 1097, 119 S. W. (2d) 359 (1938).

6. The precedent relied upon by the court was McKenzie v. Missouri Stables, Inc., 225 Mo. App. 64, 34 S. W. (2d) 136 (1930). In construing section 3309 which provides that, "Where a third person is liable to the employe or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employe or to the dependents against such third person, . . ." the St. Louis Court of Appeals held that the statute merely fixed the rights of the parties, and if the employer sued the third person, he became trustee for employee for whatever amount might be recovered in excess of the compensation which had been awarded, and if the employee sued, he became trustee for employer to the extent of the compensation which the latter had to pay.

However, in the Edwards case there was introduced in evidence an agreement between the employee, employer and insurer that the employee might maintain the action.

7. 343 Mo. 1083, 124 S. W. (2d) 1101 (1938).

putation of claimant's compensation could not be figured on the basis of annual earnings received from employer, so the commission applied sub-section (c) of section 3320, and based the award on the average commissions earned by other salesmen who were considered to be in the same class with the deceased.

The employer contended that sub-section (d) should be applied, and that the amount of commissions actually earned by deceased should be divided by the number of days he had been under contract, the result multiplied by 300, and the result divided by 52 to arrive at his weekly wage.[8]

In adopting the view of the commission, the court held that sub-section (d) applies only to those cases in which the *employer* has not been in existence for one year prior to the accident.[9]

The case of *Bunner v. Patti*[10] deserves more than passing attention. The plaintiff in a common law action recovered a sum in excess of $7500.00 on the following set of facts: The defendants were the general contractors for the Kansas City Municipal Auditorium. Plaintiff was an employee of a sub-contractor. Certain employees of the general contractors negligently unloaded a metal bucket from a steam shovel so that it rolled on plaintiff and injured him. Plaintiff's immediate employer, a sub-contractor, carried insurance, and plaintiff collected compensation from him. Plaintiff brought this action against the general contractors on the theory that they were "third persons" outside the protection of the Compensation Act, because his employer carried compensation insurance. This theory is based on sections 3308 (d) and 3309.[11]

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8. Employer's contention was based on the authority of Coble v. Scullin Steel Co., 54 S. W. (2d) 777, 778 (Mo. App. 1932) and Jackson v. Curtiss-Wright Airplane Co., 334 Mo. 805, 68 S. W. (2d) 715, 720 (1934). In the instant case the court distinguishes these two authorities on the ground that in each the employee was employed at a wage of a fixed and definite amount.

9. The case was remanded because of the admission of certain statements of various officials of employer regarding the earnings and activities of deceased. The court held that these might be admissible against the employer as admissions against interest, but they were not admissible against the insurer who was primarily liable; as against the insurer they were hearsay.

10. 343 Mo. 274, 121 S. W. (2d) 153 (1938).

11. Section 3308 (d) "In all cases mentioned in the preceding subsections, the immediate contractor or subcontractor shall be liable as an employer of the employes of his subcontractors. All persons so liable may be made parties to the proceedings on the application of any party. The liability of the immediate employer shall be primary, and that of the others secondary in their order, and any compensation paid by those secondarily liable may be recovered from those primarily liable, with attorney's fees and expenses of the suit. Such recovery may be had on motion in the original proceedings. No such employer shall be

The lower court overruled defendants' demurrer. The supreme court reversed this decision.

The court construes section 3308 (d) in this way: The first "immediate" refers to the contractor who is in charge of any particular division of the work; he may have one or more sub-contractors under him nearer in relation to the injured employee. The second and third "immediate" modifies "employer" and signifies the direct employer of the injured employee. This section makes the remote, statutory employers secondarily liable with the exception where the employee's immediate employer carries insurance.[12]

Then the question under consideration by the court was: Does the fact that a sub-contractor carries compensation insurance render the general contractor a "third person" within the meaning of section 3309?[13]

The court held that the last clause of sub-section (d) provides that no remote employer shall be liable if the injured employee was insured by his immediate or intermediate employer, but that it does not say that such remote employer shall no longer be deemed an employer and outside the protection of the law. It points out that all employers discussed in this sub-section are treated as being *within the act.*[14]

The court points out that a previous case[15] has held that the object of the statute was to prevent remote employers from avoiding liability under the act by having work done by irresponsible independent contractors.

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liable as in this section provided, if the employe was insured by his immediate or any intermediate employer. (Laws 1925, p. 375, Sec. 10.)"

Section 3309—"Injured employe may hold third person, when—effect.—Where a third person is liable to the employe or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employe or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employe or dependents, but such employer may recover any amount which such employe or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer, after deducting the expenses of making such recovery shall be paid forthwith to the employe or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation. (Laws 1925, p. 375, Sec. 11.)"

12. When an employee carries insurance the act makes the insurance carrier primarily liable and the employer secondarily liable. (Section 3325.)

13. In Langston v. Selden-Breck Const. Co., 225 Mo. App. 531, 37 S. W. (2d) 474 (1931), the St. Louis Court of Appeals had held that the employee could maintain such a suit. However, the same court in Wors v. Tarlton, 95 S. W. (2d) 1199 (Mo. App. 1936) held to the contrary.

14. In its discussion of the question, the court sets out the arguments for and against such a conclusion. There can be little doubt that it would be illogical to discriminate between employers because one requires sub-contractors to carry insurance and another does not. According to plaintiff's theory, a contractor who required his sub-contractor to carry insurance would be compelled to (1) pay the cost of the insurance (2) reimburse the insurer for compensation paid the employee, and (3) be subject to a common law action for damages.

15. Pruitt v. Harker, 328 Mo. 1200, 1207, 43 S. W. (2d) 769, 771 (1931).